Supreme Court, U.S.
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No. 06-346

In The

Supreme Court of the United States

UNIVERSAL COMPUTER SYSTEMS, INC., et al.,

Petitioners,

v.

DEALER SOLUTIONS, L.L.C., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the parties have agreed to arbitrate the "entire controversy," does the trial court have the authority to issue discovery orders and sanctions rulings that affect the merits of the arbitration?

2. When the trial court enters improper orders limiting the evidence at arbitration, is "harmless error" the proper standard of review?

3. Is it "harmless error" for a trial court to compel arbitration subject to rulings on the merits of arbitrable issues?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners:

Universal Computer Systems, Inc.
Universal Computer Consulting, Ltd.
Universal Computer Services, Inc.
Dealer Computer Services, Inc.

No publicly held company owns 10% or more of the stock of Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc., or Dealer Computer Services, Inc.

Respondent:

Dealer Solutions, L.L.C.
Dealer Solutions Holdings, Inc.

ADP, Inc.

SMC Investment, Inc. f/k/a SWT Investments, Inc.
Southwest Toyota, Inc. d/b/a Sterling McCall Toyota
SMC Luxury Cars, Inc. d/b/a Sterling McCall Lexus

Business Solutions, Inc.

ADP, Inc. owns all of the stock of Dealer Solutions Holdings, Inc.

Upon information and belief, Group 1 Automotive, Inc. owns 10% or more of the stock of SMC Investment, Inc., and/or Southwest Toyota, Inc., and/or SMC Luxury Cars, Inc.

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BASIS FOR SUPREME COURT JURISDICTION

The Supreme Court of Texas denied the petition for review on April 21, 2006. (App. 120). Petitioners Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc., and Dealer Computer Services, Inc. (collectively "UCS") seek review of that judgment on a writ of certiorari.

Petitioner timely filed a motion for rehearing on May 4, 2006. On June 9, 2006, the Supreme Court of Texas denied the motion for rehearing. (App. 121). The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the judgment of the highest court of a state.

STATUTES INVOLVED IN THIS CASE

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties

to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE

The parties to this case agreed to arbitrate the "entire controversy" between them. (App. 104). The trial court initially compelled arbitration, but then withdrew its own order, and over the next eighteen (18) months, entered a series of five (5) orders determining the trade secrets that could be presented to the arbitrators; directing the legal

standard the arbitrators could use; and limiting the evidence the arbitrators could hear. (App. 95, 98, 100, 103). With these orders in hand, the outcome of the arbitration was a foregone conclusion.

The court of appeals agreed that the trial court's meddling in the arbitration process was improper, but it refused to reverse because it reviewed the improper order for "harmless error." (App. 1). In so holding, the court of appeals failed to consider the cumulative prejudicial effect of all five (5) orders entered by the trial court.

The court of appeals recognized the clear holdings of this Court that the trial court has no authority to address the merits of a claim subject to arbitration. The application of a "harmless error" analysis would significantly erode this Court's clear directive that "in deciding whether to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986), *citing United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960).

Over the last 36 years, UCS[1] has handcrafted confidential and proprietary computer software that it licenses to car dealerships. One of UCS's long-term clients, Sterling McCall Toyota,[2] entered into a written license agreement with UCS in which it acknowledged that the licensed

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[1] Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc., and Dealer Computer Services, Inc. (collectively "UCS").

[2] SMC Investment, Inc. f/k/a SWT Investments, Inc., Southwest Toyota, Inc. d/b/a Sterling McCall Toyota, SMC Luxury Cars, Inc. d/b/a Sterling McCall Lexus (collectively "Sterling McCall").

software constituted "valuable and proprietary trade secrets of UCS." (App. 292). Sterling McCall promised to "observe complete confidentiality with respect to the Licensed Copy" and that it would "not disclose or otherwise permit any other entity access to the Licensed Copy." Id.

The principals of Sterling McCall and others surreptitiously created a new entity to develop a competing software product. Dealer Solutions[3] was created and housed in the Sterling McCall body shop and was provided unlimited access to the UCS software. DSI duplicated key components of the UCS software. Employees of DSI examined the UCS software continuously throughout the design, development, and parallel testing of DSI's software. DSI copied essential features and the overall structure of the software. In a time frame that was nothing short of miraculous, DSI, a startup entity with no experience in the industry, was able to create a software package that it sold to one of UCS's principal competitors for $63 Million.

UCS brought suit against Sterling McCall, Dealer Solutions, Business Solutions, Inc. and ADP, Inc. for misappropriation of trade secrets. The contract between UCS and Sterling McCall required arbitration of all disputes. (App. 299). When Sterling McCall demanded arbitration of the claims against it, all of the parties agreed to arbitrate the "entire controversy" and, on August 7, 2000, submitted their agreement to the trial court. (App. 104). While the trial court initially entered the order compelling arbitration, the court thereafter withdrew the

[3] Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc. (collectively "DSI").

order at Defendants' request so that it could make interlocutory rulings regarding the merits of the arbitration proceeding. (App. 103).

Instead of compelling arbitration, the trial court over the next eighteen (18) months issued a series of orders relating to answers to contention interrogatories that (1) restricted UCS's claims; (2) determined the legal standard to be used to evaluate UCS's claims; and (3) restricted the evidence that UCS could offer in the arbitration. (App. 95, 98, 100, 103). In its first set of interrogatories, DSI asked UCS to provide the following information:

> ***INTERROGATORY NO. 1:*** Identify specifically the UCS "confidential and proprietary software" that you contend was accessed by DSI personnel for the purpose of determining its functionality in order to design DSI software [as alleged in your Petition ¶¶ 10 and 11].
>
> ***INTERROGATORY NO. 3:*** Identify specifically the data records and data fields contained in any UCS software that you contend were accessed by DSI personnel to design DSI software [as alleged in your Petition ¶¶ 10 and 11, and your Response to Defendants' Request for Disclosure, part (c)].
>
> ***INTERROGATORY NO. 5:*** Identify specifically any "rules and reflexes" contained in any UCS software or computer system that you contend were copied by DSI [as alleged in your Response to Defendants' Request for Disclosure, part (c)].

> ***INTERROGATORY NO. 6:*** Identify any other alleged proprietary information, confidential information or trade secret of UCS that you contend was accessed by DSI personnel for any purpose.

(App. 306). Interrogatory No. 7 then asked UCS whether it claimed those items were trade secrets and to "state the legal theories and factual bases for such contention."

> ***INTERROGATORY NO. 7:*** For each item, document or other information identified by you in your answer to interrogatory nos. 1-6, above, state whether you contend that such item, document or other information is a trade secret and the legal theories and factual bases for such contention.

(App. 308). UCS responded and identified the confidential and proprietary software that Sterling McCall had licensed under the contract. UCS also set forth its contention why the information in the licensed software was a trade secret. On February 25, 2000, DSI and others moved to compel. Even though UCS had responded in good faith and had provided answers to the contention interrogatories, the court on March 10, 2000 granted Defendants' motion to compel answers to interrogatories. (App. 119).

On March 29, 2000, UCS again in good faith responded to DSI's contention interrogatories. DSI, dissatisfied with the response, again moved to compel. On April 12, 2000, the court again entered an order compelling answers to interrogatories but required in its order the identification of information that was never included in the interrogatories to begin with. The court ordered that:

> 1. Plaintiffs shall amend their answers to Defendants' first set of interrogatories, specifically, interrogatory nos. 1, 3, 5, 6 and 7, to state specifically the identity of each "functionality," "data field," "rule," "reflex," "structure," "design," "architecture," "integration or combination of various components," "negative knowledge," "method or process utilized for manipulation information," "trigger," "calculation code," "formula," "distribution," and "format, content, sequence, total structure and record selection of various reports," or other feature, function or element of Plaintiffs' automobile dealership management system or related written materials that is the subject of this case that Plaintiffs contend is a trade secret accessed or misappropriated by Defendants. Each trade secret claimed by Plaintiffs shall be separately identified by them in such answers. Plaintiffs' answers to such interrogatories may be made as one consolidated answer.

(App. 116). The court took language from UCS's prior response and, on the court's own initiative, referred to the terms of the response and required UCS to provide further answers. The court referred to, among other terms, "functionality," "data field," "rule," "reflex," "structure," "design," "architecture," "integration or combination of various components," "negative knowledge," and on and on, requiring responses that were not included in DSI's contention interrogatories. The court raised the standard for a response never requested to begin with, and the court orders became moving targets. The court went on, and again, on its own initiative, abrogated application of the rules regarding responses that referenced documents. The court stated:

> 2. Plaintiffs shall not avail themselves of the option provided for by Rule 197.2(c) of the Texas Rules of Civil Procedure, except in the event that a specific business record may be designated by Plaintiffs in their answers as specifically describing an identified trade secret, because the burden of deriving or ascertaining the answer to Defendants' interrogatories is not substantially the same for Defendants as for Plaintiffs with respect to the information requested by such interrogatories and required to be provided by this Order.

(App. 116). Even though the court's order went far beyond the original contention interrogatories, UCS responded in good faith. DSI again moved to compel.

On June 15, 2000, the court yet again entered another order requiring additional responses that went far beyond the contention interrogatories and even the court's prior orders. The trial court again took terminology from UCS's response and ordered UCS to supplement answers to interrogatories that were not included in the original contention interrogatories. The court stated:

> 1. Plaintiffs shall amend their answers to Defendants' First Set of Interrogatories, specifically interrogatories nos. 1, 3, 5, 6 and 7, to specifically and separately identify, as they have heretofore failed to do, as a joint and consolidated answer to such interrogatories, each particular process, formula, pattern, device, compilation of information, or other matter that is the subject of this case that Plaintiffs contend is a trade secret accessed or misappropriated by Defendants, by separately stating each such trade secret and describing the nature, subject matter, and details of each such trade secret with

sufficient particularity to show its unique and secret nature to separate it from the general knowledge of those involved in automobile dealership management and the specific knowledge of those skilled in automobile dealership management systems.

2. Such amended answers shall, without limitation specifically identify by stating and describing as provided in paragraph 1 above, each "functionality," "data field," "rule," "reflex," "structure," "design," "architecture," "negative knowledge," "method or process utilized for manipulation information," "trigger," "calculation code," "formula," "distribution," and "format, content, sequence, total structure and record selection of various reports," or other feature, function or element of Plaintiffs' automobile dealership management system or related written materials that is the subject of this case that Plaintiffs contend is a trade secret accessed or misappropriated by Defendants.

3. If Plaintiffs' claim that the overall "structure, architecture and design of its computer system as a whole" is a trade secret misappropriated by Defendants, Plaintiffs' [sic] shall specifically identify such system as a trade secret and describe with sufficient particularity how its' [sic] combination of identified trade secret and non-trade secret characteristics, features [sic] functionalities and components interact and work together, and are adapted, implemented, integrated and applied to form a whole unified process, design and operation which is unique and secret in combination and which separates it from the general knowledge of those involved in automobile dealership management and specific

> knowledge of those skilled in automobile dealership management systems.

(App. 113). The court's order raised the standard for a response and included matters that were never requested to begin with. Again, the court, on its own initiative, ordered UCS to respond without being able to produce documents normally provided for under Rule 197.2(c) of the Texas Rules of Civil Procedure. (App. 115). UCS objected to the breadth of the court's order and sought relief in the trial court. On July 14, 2000, UCS again responded to the order in good faith.

On January 25, 2001, the trial court concluded that UCS had not adequately answered the interrogatories and held, on its own initiative:

> 4. that because of such failure by Plaintiffs the stay of discovery by Plaintiffs shall be continued, and there shall be taken as established a presumption of the non-existence of any trade secret or trade secrets claimed by Plaintiffs, subject to the Plaintiffs being required during the next 30 days to adequately answer such interrogatories as directed and to rebut the presumptions of the nonexistence of trade secrets by such answer in order to avoid the presumption becoming irrebuttable and to avoid dismissal upon any motion for summary judgment by Defendants.

(App. 100). To avoid dismissal as indicated by the court, UCS was compelled to stipulate that the only trade secret being claimed was the "overall structure, architecture and design of its computer system as a whole." And UCS again responded in good faith to the trial court's order.

On December 10, 2001, the trial court finally accepted in part UCS's responses to interrogatories. (App. 98). The

trial court granted UCS's motion to lift the discovery stay, denied DSI's, Sterling McCall's, and BSI's motions to dismiss for discovery abuse and held that "Plaintiff's evidence in support of its claim that its automobile dealership management software system is a trade secret shall be limited to its proof set forth in its responses and supplemental responses to interrogatories submitted to Defendants prior to September 1, 2001." *Id.*

Incredibly, DSI moved for "clarification" of the order. The court conducted a hearing and entered yet another order that even the Texas Court of Civil Appeals held was improper. (App. 95). The court stated "Plaintiffs' evidence identifying and describing their trade secrets shall be limited to their interrogatory responses served on February 21, 2001, which Plaintiffs have stipulated are a complete description of their claimed trade secret." (App. 96). UCS never so stipulated. UCS responded five separate times to the court's orders, and the trial court on Defendants' repeated requests restricted UCS's claims, restricted UCS's evidence, and foreclosed a fair hearing on the merits.

The trial court's orders prejudiced UCS. On the very first day of the arbitration hearing, before any evidence was offered, DSI provided the arbitrators with a binder containing the entire series of orders and pleadings from the trial court. DSI argued that these issues had already been decided by the trial court and that the arbitrators were required to follow them.

Counsel for DSI made a lengthy presentation to the arbitrators about the proceedings before the trial court

and the events that took place – after the parties submitted their agreement to arbitrate in August of 2000 – that led to the trial court's orders:

> And after receiving those [February 21, 2001] interrogatory responses, we were still of the view that the plaintiffs had not complied with the trial court's June 15th, 2000 order that specified how the trade secret was to be described; and we filed a second motion to dismiss for discovery abuse.
>
> At that point we had a hearing on May 31st, 2001, before [the special master] Judge Bianchi; and we argued to Judge Bianchi that they still hadn't complied, that the presumption that there simply was no trade secret should be turned into a final order dismissing the case.
>
> At that hearing, UCS's counsel argued that their February 21st interrogatory answers were the best that they could do to describe their trade secret. And they said "we have described our trade secret as well as we can. This is all we can do." And the defendants are just, you know, trying to get out of this case on a discovery sanction instead of trying the case on the merits as to whether or not there was a trade secret.
>
> Judge Bianchi then essentially crafted an order that avoided the dismissal of the case but entered a very severe restriction with regard to the plaintiff's evidence. And what he did was say two things: He – he identified what the trade secret that the plaintiffs can claim in this case was, because that had been a moving target for two years.
>
> At points, the plaintiffs would say: Well, it's our functionality; and it's the triggers and reflexes

> that our software follows and the behavior of the programs. At other points in time they would say: Well it's our applications. And at other points in time they would say: Well, it's just the whole ball of wax.
>
> Finally, having addressed this through these motions, and at that hearing, Judge Bianchi identified what the trade secret that the plaintiffs could claim would be; and in the May order, paragraph 6, he ordered: "Plaintiffs have stipulated that the only trade secret being claimed in their action is the overall structure, architecture, and design of their computer system as a whole and not any individual process, formula, pattern, device, or compilation of information or other matter."
>
> And so there he set what the definition of the trade secret in general terms was, and that was the architecture of UCS's entire dealer management software system.
>
> Then, taking counsel for UCS at his word, and imposing a sanction short of dismissing their case, he said in paragraph 6, "Plaintiffs evidence identifying and describing their claimed trade secret shall be limited to their interrogatory responses served on February 21st, 2001, which plaintiffs have stipulated are a complete description of their alleged trade secret."

(App. 136). He concluded as follows:

> We want to ensure that the scope of this case is limited to the sole trade secret *that the trial court said should be at issue in the case* and to the only

> evidence *that the trial court said the plaintiffs could offer* to identify that claimed trade secret.

(App. 138), emphasis added.

Following this submission, the arbitrators made plain that "we will follow the Court's order" (App. 150), repeating that "so there is no confusion, we are going to follow the Court's order." (App. 155).

As the arbitration progressed, the arbitrators repeatedly expressed confusion and concern about the basis for the orders and even asked at one point if they could contact the special discovery master who had drafted the orders in the first place. (App. 155, 159, 181, 186-197, 204-208, 225-226, 257-259, 260-261). Nevertheless, the arbitrators described the trial court's orders as their "road map" (App. 175, 228) and repeatedly admonished UCS that it should "be mindful" of the trial court's orders and that its case was going to "rise and fall" based on those orders. (App. 175). Excerpts from the arbitration hearing are included in UCS's Appendix, including the chairman's comments that the panel would "consider that as part – in our decision" and that "the issue is whether or not you really do comply." (App. 212-213).

The arbitration panel, following the trial court's order, excluded over 12,000 pages of manuals that UCS sought to introduce to describe its software. (App. 166-173, 193-197, 211-212, 219-221, 241, 256-258). UCS had produced these materials in their prior responses to interrogatories, but the arbitrators adopted the trial court's order that "Plaintiffs' evidence identifying and describing their claimed trade secret shall be limited to their interrogatory answers served on February 21, 2001." (App. 96).

The court's five separate orders eviscerated UCS's legal theories and evidence to support those legal theories. While UCS responded carefully to each of the court's orders, the orders each time raised the standard that UCS had to meet. The trial court's orders became moving targets that on each occasion raised the standard, improperly articulated the standard for what constitutes a trade secret and eviscerated the evidence that UCS could offer to support its claims.

The orders entered by the trial court went directly to the merits of UCS's claim, contrary to a core tenet of the United States Supreme Court's *Steelworkers* trilogy that the trial court has "no business weighing the merits of the grievance." *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960).[4] The outcome of the arbitration was a foregone conclusion. The trial court's orders dictated to the arbitrators how and what was to be considered. The outcome dictated by the Court's orders was so clear that DSI characterized the orders as "death penalty sanctions." (App. 143). The arbitration panel, in a two-to-one decision, concluded that the Defendants had not misappropriated DSI's trade secrets. (App. 33).

Importantly, Defendants' did not simply rely on the final order of May 9, 2002 to restrict UCS's evidence. Defendants used the entire series of the trial court's orders restricting UCS's claims and evidence to shape the whole arbitration proceeding. At the beginning of the hearing,

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[4] The *Steelworkers* trilogy is comprised of three cases decided by the Supreme Court on June 20, 1960. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Defendants provided each of the arbitrators with a "booklet" of the five orders and began the hearing with a historical presentation of the sequence of the orders that restricted UCS's claims and evidence. The court of appeals, while acknowledging that the trial court's order of May 9, 2002 was improper, failed to consider that the entire series of orders was improper and that the entire series of orders was used at the arbitration hearing to restrict UCS's claims and evidence.

Defendants argued continuously throughout the hearing that UCS could not establish the existence of a trade secret because of the limitations imposed by the trial court's orders. Ultimately, the arbitrators accepted this view and held that those orders dictated the results of the hearing. The arbitrators even cited directly to the trial court's orders as a basis for their findings:

> Under the Order of May 9, 2002, the only trade secret claimed by UCS is the overall structure, architecture, and design of its computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter. May 9, 2002 Order. UCS' evidence identifying and describing the claimed trade secret is limited to its interrogatory responses served on February 21, 2001. May 9, 2002 Order. Because UCS' February 21, 2001 interrogatory responses do not in fact describe overall structure, architecture, and design of the UCS computer system as a whole, UCS is barred from providing the necessary element of a claim for misappropriation of trade secrets.

(App. 49).

> To meet its burden of adequately identifying its alleged trade secret, UCS had to describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade. May 9, 2002 Order; June 15, 2000 Order.

(App. 50).

The trial court summarily denied UCS's motion to vacate the arbitration award. The court of appeals recognized that the trial court's orders were improper, but it refused to disturb the judgment based on a "harmless error" standard of review. (App. 16). The Texas Supreme Court refused to hear the case. (App. 119, 120).

Notably, UCS tried to prevent the entry of these orders in the first place by filing a petition for writ of mandamus and an interlocutory appeal when the trial court refused to compel arbitration and instead retained jurisdiction so that it could enter discovery sanctions against UCS. Both of UCS's pleas for relief were summarily denied without analysis. *In re Universal Computer Systems, Inc.*, 2002 WL 538978 (Tex. App. – Houston [1st Dist.] 2002); *Universal Computer Systems, Inc. v. Dealer Solutions, L.L.C.*, 2002 WL 31030747 (Tex. App. – Houston [1st Dist.] 2002).

ARGUMENT

I. The trial court's orders were plainly improper.

Justice Bland, writing for the court of appeals, specifically held that the trial court's order was improper. Recognizing the long-established mandate of the United States

Supreme Court in the *Steelworkers* trilogy, the court of appeals held that the trial court "should not have issued a discovery order limiting the presentation of evidence during the arbitration. . . ." (App. 24).

The statutory mandate is clear. The Federal Arbitration Act (FAA) mandates that trial courts compel arbitration without addressing the merits of the arbitrable dispute. Section 3 of the FAA provides in part that:

> [T]he court in which said suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, ...

9 U.S.C. § 3 (emphasis added).

The Texas Arbitration Act (TAA) is likewise mandatory. The act provides in relevant part:

> The court *shall* stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made under the subchapter.

TEX. CIV. PRAC. & REMS. CODE § 171.025 (2005) (emphasis added).

The statutory mandates are clear. If the matter is subject to arbitration, the trial court has no discretion but to compel the matter to arbitration. One forum has been contemplated to resolve the dispute – either court or arbitration – but not both. The statutory mandate precludes splintering or dividing up into pieces the merits of the case.

In 1960, the United States Supreme Court made clear that "in deciding whether to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986), *citing United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960).

Both the United States Supreme Court and the Supreme Court of Texas have repeatedly stressed that the courts *must* enforce arbitration agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). Justice Marshall made clear in *Byrd* that the Federal Arbitration Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Justice Enoch stated plainly that "[o]nce the trial court concludes that the arbitration agreement encompasses the claims, and that the party opposing arbitration has failed to prove its defenses, the trial court has no discretion but to compel arbitration and stay its own proceedings." *In re Firstmerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001).

Once the parties submitted their agreement to arbitrate, the trial court had no authority to examine the merits of the underlying controversy, much less issue discovery orders and sanctions directed at the core issues in the arbitration. *General Warehousemen & Helpers Union Local No. 767 v. Albertson's Distribution, Inc.*, 331 F.3d 485, 487 (5th Cir. 2003) ("Because the district court improperly substituted its judgment for that of the arbitrator, we reverse."); *United Steelworkers of Am., AFL-CIO v. Asarco, Inc.*, 970 F.2d 1448, 1451 (5th Cir. 1992) ("The court's role is very limited when deciding issues of arbitrability. The

court's function is to decide whether the claim asserted is the type of claim which the parties have agreed to arbitrate. In no way are the courts to consider the merits of a party's claim."); *United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994) ("The Supreme Court has stated unequivocally that the courts have no business determining the merits of a grievance under the guise of deciding questions of arbitrability. . . . The courts have the duty only to determine whether a party has breached its promise to arbitrate."); *Oil, Chemical & Atomic Workers Int'l Union, Local 7-1 v. Amoco Oil Co.*, 883 F.2d 581, 584 (5th Cir. 1989) ("The third principle courts must follow in deciding the issue of arbitrability is to determine *only* whether the grievance is arbitrable. The court is not to rule on the potential merits of the underlying grievance, even if it appears to the court to be frivolous."); *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486 (5th Cir. 2002) ("[J]urisdiction by the courts to intervene into the arbitral process prior to issuance of an award is very limited. Courts are limited to determinations regarding whether a valid agreement to arbitrate exists and the scope and enforcement of the agreement.").

II. The court of appeals erred when it applied the "harmless error" standard of review to the trial court's orders.

Nothing in the Federal Arbitration Act authorizes a "harmless error" standard of review. Nothing in the Texas Arbitration Act authorizes a "harmless error" standard of review. No case supports the application of the "harmless error" standard of review where a trial court has entered discovery and sanction orders in a matter that should have

been compelled to arbitration. The statutory mandate requires that the matter be compelled to arbitration without delay and without interference by the trial court. The long-standing Supreme Court precedent – the *Steelworkers* trilogy – reiterates and applies the statutory mandate that the trial court has no authority to delay or meddle with the merits of the case.

The harmless error approach used by the court of appeals is inconsistent with these principles. None of these cases even considered whether the alleged error "probably caused the rendition of an improper judgment." Such an approach would not only thwart the clear directives of the Supreme Court, but it would embroil the courts in the very issues it was supposed to avoid – the merits of the arbitrable controversy.

Judicial interference in the arbitration process is not reviewed for harmless error. Arbitration awards are reviewed only for specific statutory grounds, and courts are directed not to rule on the merits of arbitrable controversies. If the court does interfere with the arbitration, then the entire arbitral process has been corrupted, the fundamental policy interests underlying the arbitration process are no longer valid, and the entire process must be restarted. Were the rule otherwise, every decision denying arbitration could be deemed to be harmless error because it would be impossible for the aggrieved plaintiff to prove that the outcome would have been different. If the trial court's orders were improper – as the court of appeals held – then the entire process must be restarted.

III. The trial court had no authority to enter five different orders restricting UCS's claims and evidence.

The court of appeals correctly held that entry of the final order limiting UCS's evidence was improper. (App. 24). The court of appeals failed to consider, however, that all five of the orders entered by the court were tied together in a sequence that not only restricted UCS's evidence, but also restricted UCS's substantive claims and determined the legal standard that the arbitrators could use to evaluate those claims. (App. 95, 98, 100, 103). The final order was simply a manifestation of the four prior orders wherein the trial court adjudicated the definition of a trade secret and set forth the standard of a trade secret – an improper standard – that UCS had to meet.

All five orders entered by the trial court are improper for the same reason that the final order was improper. Each order rearticulated the standard that UCS had to meet based upon UCS's prior good faith response to the court's earlier order. The trial court's order would take language from the prior response and include it in the subsequent order, compelling UCS to make a further response. Each successive order became a moving target and raised the standard each time that UCS had to satisfy.

As the court of appeals recognized, the United States Supreme Court has made clear that parties who agree to arbitrate their disputes are entitled to have the arbitrators decide the merits of the claim – not an intermeddling trial court that might enter orders splintering the issues that must be finally decided by the arbitration panel. Splintering the issues that are to be decided by the arbitrators is

exactly what happened in the case at hand. The arbitrators were not clear on the meaning of the five orders and requested of the parties permission to contact the special master to determine what he intended by the orders. UCS cannot possibly have a fair hearing on the merits of its claim when the trial court enters orders splintering and cutting into different pieces the legal theories and evidence that the arbitrators are to decide.

IV. The legal standard set forth by the trial court was incorrect.

The legal standard set forth in the orders was legally incorrect. The trial court pronounced that UCS's claims should be evaluated under the following standard:

> Plaintiffs shall specifically identify such system as a trade secret and describe with sufficient particularity how its combination of identified trade secrets and non-trade secret characteristics, features, functionalities and components interact and work together, and are adapted, implemented, integrated, and applied to form a whole unified process, design, and operation which is unique and secret in combination and which separates it from the general knowledge of those involved in automobile dealership management and specific knowledge of those skilled in automobile dealership management systems.

(App. 114). The standard articulated by the trial court is inconsistent with Texas law. Texas law is well-settled that uniqueness and novelty are not requirements of a trade secret. *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool*

Serv., 314 S.W.2d 782, 789 (Tex. 1958); *see Metallurgical Industries, Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1202 (5th Cir. 1986); *Cataphote v. Hudson*, 422 F.2d 1290, 1293-94 (5th Cir. 1970).

Unbelievably, the two member majority of the arbitration panel did not even acknowledge, cite to, refer to or distinguish these leading Texas authorities. (App. 33). Texas case law is replete that trade secrets do not have to be unique. Texas law is clear that the elements of a trade secret may be in the public domain, but when assembled or utilized in such a fashion that is maintained as a secret is a valid trade secret. The trial court's order articulated a standard that was legally incorrect.

V. The court of appeals' reliance on the catch-all paragraph in the arbitrators' opinion that the arbitrators admitted evidence is misplaced because it measures that evidence against the wrong legal standard.

The court of appeals, in concluding that the trial court's error was harmless, relied upon the catch-all paragraph in the arbitrators' award that they would have reached the same conclusion "[e]ven if UCS's evidence describing its alleged trade secret were not limited to UCS's February 21 Responses." (App. 50).

The court of appeals' reliance was misplaced. The trial court's order instructed the arbitrators that the trade secret was the "overall architecture, structure and design of the system as a whole" and dictated the standard that UCS had to meet. (App. 95). The arbitrators measured the evidence against the standard dictated by the trial

court. The whole series of orders dictated to the arbitration panel the standard that had to be met to show misappropriation and the evidence UCS could offer to show it. The catch-all paragraph relied upon by the court of appeals simply restates the trial court's order setting the standard and defining what constitutes a trade secret. The trial court had no authority to set the standard for what constitutes a trade secret. That is an issue that goes to the very heart of the case and is a matter for the arbitrators to decide.

CONCLUSION

The trial court refused to enforce the parties agreement to arbitrate. Instead, it issued a series of orders instructing the arbitrators how to conduct the arbitration, including what claims could be pursued, what standards they could use to evaluate those claims, and what evidence they could consider.

The misconduct that occurred at the Sterling McCall body shop was an outrage. UCS is entitled to a fair and impartial arbitration hearing, untainted by rulings by the trial court on the merits of the controversy.

Arbitration is the dispute resolution forum of the future. To preserve a fair presentation of the merits of the dispute, this Court has made clear that a trial court compelling a dispute to arbitration cannot decide the merits of the claims or make rulings that splinter or break into pieces determination of the facts into two different forums. To fairly litigate a claim, a litigant is entitled to

one forum to decide all of the merits – not just part of splintered or disconnected factual or legal issues.

Respectfully submitted,

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Opinion issued November 23, 2005

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-04-01088-CV

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC., Appellants

V.

DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., ADP, INC., SMC INVESTMENT, INC. f/k/a SWT INVESTMENTS, INC., SOUTHWEST TOYOTA, INC. d/b/a STERLING MCCALL TOYOTA, SMC LUXURY CARS, INC. d/b/a STERLING MCCALL LEXUS, AND BUSINESS SOLUTIONS, INC., Appellees

* * *

ADP, INC., Cross-Appellant

V.

UNIVERSAL COMPUTER SYSTEMS, INC., Cross-Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 99-11466

OPINION

The parties in this trade secrets case agreed to arbitrate their claims against each other, and did so, but not before a lengthy discovery battle in the trial court. The trial court confirmed the arbitrators' decision, from which the losing parties appeal. Appellate review of the confirmation of arbitration decisions is very limited, as such decisions are meant to be final in all but exceptional cases. We hold that the facts presented here are not exceptional under the applicable caselaw. We further hold that the trial court should not have issued a discovery order limiting the presentation of certain evidence before the arbitrators, but the arbitrators allowed the evidence and considered it in any event, thus ameliorating any harm. We therefore affirm the trial court's confirmation of the arbitrators' decision.

Appellants Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc., and Dealer Computer Services, Inc. (collectively "UCS") appeal the judgment confirming an arbitration award in favor of appellees Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc. (collectively "DSI"), SMC Investment, Inc. f/k/a SWT Investments, Inc., Southwest Toyota, Inc. d/b/a Sterling McCall Toyota, SMC Luxury Cars, Inc. d/b/a Sterling McCall Lexus (collectively "Sterling McCall"), and Business Solutions, Inc. ("BSI"), and cross-appellant ADP, Inc. ("ADP"). UCS contends that (1) the trial court had no authority to enter an order defining the scope of UCS's trade secrets claim to be heard at the arbitration hearing; (2) the trial court abused its discretion by imposing this discovery sanction before sending the case to arbitration; and (3) the arbitrators' decision is a gross mistake because the arbitrators (a) ignored the plain

and unambiguous language of a license agreement between UCS and Sterling McCall, (b) failed to recognize three Texas cases involving trade secret waiver, (c) found that DSI did not use UCS's trade secrets, (d) failed to recognize disgorgement damages, and (e) found that UCS's trade secret misappropriation claim is preempted by federal copyright law. In its cross-appeal, ADP asserts that, although the arbitrators correctly decided the preemption issue, should we decide otherwise, then ADP is entitled to injunctive relief.

Factual and Procedural Background

UCS provides computer systems to car dealerships. In 1985, UCS contracted to license software to Sterling McCall. The contract required Sterling McCall to keep confidential "the programs and software" covered under the agreement. The contract also contained a provision requiring arbitration of "any claim, grievance, or controversy between customer and UCS . . . arising out of this agreement[.]"

In 1994, Sterling McCall and BSI, a software consulting firm, contracted to develop a dealer management computer system called "CARMan" to replace Sterling McCall's existing UCS system. The following year, Sterling McCall and BSI formed another entity, DSI, to continue developing the CARMan system. DSI employees had offices at the Sterling McCall body shop and had access to the UCS computer system. In early 1997, DSI displayed CARMan at the National Automobile Dealers Association annual convention. ADP acquired DSI in early 1999.

UCS sued in March 1999, alleging that appellees misappropriated UCS's trade secrets by accessing the UCS

software at Sterling McCall to assist in designing and perfecting CARMan. In addition, UCS alleged that Sterling McCall breached the confidentiality provision of its license agreement with UCS. ADP counterclaimed for misappropriation of trade secrets against UCS, alleging that UCS obtained ADP's software without permission and used it to develop competing products.

The Discovery Dispute

In April 1999, DSI propounded interrogatories to UCS asking it to identify each trade secret it contended DSI had misappropriated. UCS responded by naming its various software applications and programs. Dissatisfied with UCS's response, DSI moved to compel UCS to supplement its answers to the interrogatories with information specifically identifying the trade secrets DSI allegedly misappropriated. Pursuant to the recommendation of the special master appointed by the trial court to handle discovery disputes, the court granted DST's motion to compel.

UCS filed a supplemental response in which it clarified that DSI and BSI allegedly "accessed every UCS software application used at [Sterling McCall,]" all of which UCS provided on a confidential basis. Still dissatisfied with UCS's response, DSI filed a second motion to compel. Pursuant to the special master's recommendation, the trial court granted DSI's second motion to compel,[1]

[1] Specifically, the trial court ordered UCS, in its supplemental response, to "state specifically the identity of each 'functionality,' 'data field,' 'rule,' 'reflex,' 'structure,' 'design,' 'architecture,' 'integration or combination of various components,' 'negative knowledge,' 'method or process utilized for manipulation information,' 'trigger,' 'calculation

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stayed all discovery by UCS, and ordered UCS to pay DSI $250 in attorney's fees.

In its second supplemental response, UCS clarified that DSI allegedly had "misappropriated the architecture, structure, and design" of the overall UCS computer system at Sterling McCall, as well as the individual application packages. DSI filed another motion to compel, asserting that UCS's response "failed to specifically identify a single trade secret that UCS might have." On June 15, 2000, the trial court, on recommendation of the special master, once again granted DSI's motion to compel. Specifically, the court ordered UCS to supplement its response as follows:

> [UCS] shall amend [its] answers to Defendants' First Set of Interrogatories . . . to specifically and separately identify, as [it] ha[s] heretofore failed to do, . . . each particular process, formula, pattern, device, compilation of information, or other matter that is the subject of this case that [UCS] contend[s] is a trade secret accessed or misappropriated by [appellees], by separately stating each such trade secret and describing the nature, subject matter, and details of each such trade secret with sufficient particularity to show its unique and secret nature to separate it from the general knowledge of those involved in automobile dealership management

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code,' 'formula,' "distribution,' and 'format, content, sequence, total structure and record selection of various reports,' or other feature, function or element of [UCS's] automobile dealership management system or related written materials that is the subject of this case that [UCS] contend[s] is a trade secret accessed or misappropriated by [appellees]. Each trade secret claimed by [UCS] shall be separately identified by [it] in such answers."

> and the specific knowledge of those skilled in automobile dealership management systems.
>
> . . . .
>
> If [UCS] claim[s] that the overall "structure, architecture and design of its computer system as a whole" is a trade secret misappropriated by [appellees], [UCS] shall specifically identify such system as a trade secret and describe with sufficient particularity how its' [sic] combination of identified trade secret and non-trade secret characteristics, features functionalities and components interact and work together, and are adapted, implemented, integrated and applied to form a whole unified process, design and operation which is unique and secret in combination and which separates it from the general knowledge of those involved in automobile dealership management and specific knowledge of those skilled in automobile dealership management systems.

The trial court also continued the discovery stay against UCS and ordered it to pay DSI $500 in attorney's fees.

UCS moved to set aside the trial court's June 15, 2000 order. The trial court held an evidentiary hearing on UCS's objection on July 10-11, 2000, and UCS supplemented its response for a third time on July 14, 2000. In its third supplemental response, UCS stated that

> DSI misappropriated the architecture, structure, and design of the UCS computer system as a whole. . . . UCS' unique combination of features and functions into a unified and integrated computer system, and the way those components fit together to form the unique whole, was a protectable trade secret that was misappropriated by DSI.

Along with its third supplemental response, UCS also filed a proposed order referring the case to arbitration. In a letter dated July 14, 2000, DSI objected to UCS's third supplemental response, but advised the trial court that the parties had agreed to the entry of an order referring the case to arbitration.

The trial court held another hearing on August 7, 2000, at which time it upheld its June 15, 2000 order and advised UCS that it would be required to file a fourth supplemental response by September 18, 2000. The trial judge also informed the parties that he would grant their agreed order to arbitrate, but would not sign it until October 2, 2000.

UCS filed its fourth supplemental response on September 18, 2000 and attached thousands of pages of information describing how the UCS software works.[2] DSI requested and set a hearing for October 16, 2000 concerning the trial court's anticipated entry of the agreed order to arbitrate. DSI then filed a motion to dismiss for discovery abuse based on UCS's alleged failure to identify a single trade secret.

The trial court signed the agreed order to arbitrate on October 2, 2000. One week later, DSI moved to set aside

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[2] In response to the trial court's June 15, 2000 order that required UCS to describe its alleged trade secret with more specificity, UCS stated, "This section of material provides examples of seven software applications and their particular role in identifying the UCS system on a whole as a trade secret. Within each document, programs and fields are described with particularity to the interaction of UCS trade secrets and non-trade secrets that have been adapted in such a way as to form a complete unified process which is unique and secret so as to be separated from general dealership knowledge."

the arbitration order pending resolution of its motion to dismiss. The trial court granted DSI's motion, withdrew the arbitration order, and ordered that the agreed order to arbitrate would "be enforced at a future date."

On January 25, 2001, the trial court entered an order on DSI's motion to dismiss, finding that although UCS had failed to adequately answer the interrogatories, sanctions were not yet justified. Instead, the court "established a presumption of the non-existence of any trade secret . . . claimed by [UCS], subject to [UCS] being required during the next 30 days to adequately answer such interrogatories as directed and to rebut the presumptions of the non-existence of trade secrets[.]" The court also observed that "[UCS] ha[s] stipulated that the only trade secret being claimed by [it] in th[is] action is the overall structure, architecture and design of its computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter."

UCS filed its fifth supplemental response on February 21, 2001, asserting that its data fields, "unique combination of functionality of [its] software programs[,]" overall structure and architecture of its software programs, unique formats of the reports generated by its software, and "combination of reporting functionality" are all trade secrets. DSI subsequently filed a second motion to dismiss for discovery abuse based on UCS's alleged refusal to specifically describe any trade secret.

On December 10, 2001, pursuant to the special master's recommendation, the trial court denied DSI's second motion to dismiss, but ordered that "[UCS]'s evidence in support of its claim that its automobile dealership management software system is a trade secret shall be limited

to its proof set forth in its responses and supplemental responses to interrogatories submitted to [appellees] prior to September 1, 2001." Two days later, UCS again moved to compel arbitration. DSI responded that, before ruling on the motion to compel arbitration, the trial court should clarify the evidentiary limitation imposed in its December 10, 2001 order.

After holding a hearing, the trial court granted in part and denied in part the motion to compel arbitration and ordered as follows:

> All parties and all claims alleged in this case shall be referred to arbitration for the resolution of such claims. However, the Court's order referring this matter to arbitration will be entered by the Court only after (1) [appellees] have an opportunity to seek clarification of the December 10, 2001 Order denying Defendants' Second Motion to dismiss for Discovery Abuse from the Special Master . . . , and (2) all parties have had an opportunity to object to the Special Master's order and obtain a ruling on such objections by the Court.

UCS filed a petition for a writ of mandamus in this Court, complaining of the trial judge's partial denial of its motion to compel arbitration. *In re Universal Computer Sys., Inc.*, No. 01-02-00343-CV, 2002 WL 538978, at *1 (Tex. App. – Houston [1st Dist.] Apr. 8, 2002, orig. proceeding) (not designated for publication). We declined to grant mandamus relief. *Id.*

On May 9, 2002, the trial court clarified its December 10, 2001 order as follows:

> [UCS] ha[s] stipulated that the only trade secret being claimed by [it] in [its] action is the overall

> structure, architecture and design of [its] computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter.
>
> [UCS's] evidence identifying and describing [its] claimed trade secret shall be limited to [its] interrogatory responses served on February 21, 2001, which [UCS] ha[s] stipulated are a complete description of [its] claimed trade secret.

With these orders in hand, the parties proceeded to arbitration.

The Arbitration

A panel of three arbitrators conducted the arbitration hearing, which lasted three weeks.[3] After noting UCS's stipulation regarding the theory of its case set forth in the trial court's January 25, 2001 order, the arbitrators initially decided to "follow the [c]ourt's order," and "hold [UCS] to its burden of structure, architecture, and design." However, when DSI objected that UCS's evidence exceeded its February 21, 2001 interrogatory responses, the arbitrators allowed the evidence and decided to carry the issue with the case.[4] Thereafter, on numerous occasions, the

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[3] Gary McGowan, the Honorable Susan Soussan, and the Honorable Alvin Zimmerman comprised the arbitration panel.

[4] Specifically, the chair arbitrator ruled as follows:

> ARBITRATOR ZIMMERMAN: Right now we're choosing to kind of put our foot in the water and walk through this for a while and see where it takes us. So, we're not preruling that your objection is right or wrong; we're going to carry your objection. We're not preruling whether he's overstepping his bounds or not. And that's what we tried to relate to everybody. This is

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arbitrators declined to limit the testimony or introduction of evidence by UCS based on the trial court's May 9, 2002 order. UCS proceeded to put on nearly two weeks of testimony, followed by one week of testimony from appellees.

The arbitrators issued their corrected decision on November 25, 2003. A majority of the panel found as follows:

> Under the Order of May 9, 2002, the only trade secret claimed by UCS is the overall structure, architecture and design of its computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter. May 9, 2002 Order. UCS's evidence identifying and describing the claimed trade secret is limited to its interrogatory responses served on February 21, 2001. . . . Because UCS's February 21, 2001 interrogatory responses do not in fact describe overall structure, architecture and design of the UCS computer system as a whole, UCS is barred from proving the necessary element of a claim for misappropriation of trade secrets.
>
> Even if UCS's evidence describing its alleged trade secret were not limited to UCS's February 21 Responses, UCS's evidence at trial demonstrated, at most, that some defendants obtained from the UCS system a partial list of UCS data fields, features, and functionalities. These do not constitute the overall architecture, structure, and design of the UCS system as a whole. Furthermore, in light

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delicate waters with a lot of hills and valleys that we're, frankly, trying to feel our way through.

> of the unrebutted direct evidence of the substantial differences between CARMan and UCS, the circumstantial evidence presented by UCS as to misappropriation and use does not meet UCS' burden to prove these elements by a preponderance of the evidence.
>
> UCS has failed to establish the existence of a trade secret other than its code, which was not misappropriated by defendants.

A majority of the panel also decided that, even though it was "unnecessary" to reach the copyright preemption issue, given the majority's finding that UCS had failed to prove its trade secret misappropriation claim, the panel would decide the issue because the parties had extensively briefed it. Relying on Texas caselaw,[5] a majority of the arbitration panel concluded that federal copyright law preempted UCS's claim for misappropriation of trade secrets.

With respect to ADP's counterclaim, a majority of the panel found that UCS misappropriated ADP's trade secret object code, but ADP's misappropriation claim similarly was preempted. The panel majority noted that, "[i]f this legal conclusion [regarding preemption] is incorrect, ADP would be entitled to an injunction prohibiting UCS from running ADP's code from the UCS offices either by way of

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[5] *See Butler v. Continental Airlines, Inc.*, 31 S.W.3d 642 (Tex. App. – Houston [1st Dist.] 2000, pet. denied); *see also Butler v. Continental Airlines, Inc.*, No. Civ.A.01-2194, 2001 WL 1509545 (S.D. Tex. Nov. 19, 2001); *Microsource, Inc. v. Superior Signs, Inc.*, No. CIV.A.3:97-CV-2733-G, 1998 WL 119537 (N.D. Tex. Mar. 9, 1998); *Butler v. Continental Airlines, Inc.*, 116 S.W.3d 286 (Tex. App. – Houston [14th Dist.] 2003, pet. denied).

a dial-up modem or on a system it has misappropriated, or by any other means."

Following the arbitration proceeding, DSI and ADP moved to confirm the arbitration award,[6] while UCS moved to vacate the award. The trial court confirmed the arbitration award on December 30, 2003.

Analysis

Pre Arbitration Orders

UCS contends that the trial court abused its discretion by not sending the case immediately to arbitration and by seeking to limit the evidence UCS could introduce at the arbitration hearing through discovery orders entered after the case should have been sent to arbitration. UCS characterizes the trial court's May 9, 2002 order restricting the evidence UCS could introduce at the arbitration hearing as an improper death-penalty sanction.

"Once a party seeking to compel arbitration establishes that an agreement [to arbitrate] exists . . . , and that the claims raised are within the agreement's scope, the trial court has no discretion but to compel arbitration and stay its proceedings pending arbitration." *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding) (quotation omitted); *see also Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 929 (Tex. App. – Houston [1st Dist.] 1996, no writ) ("If the court finds the arbitration provision valid, it shall order arbitration."); *In re Jebbia*,

[6] ADP "expressly reserve[d] its right to complain in the event of an appeal of the part of the Award holding that it shall take nothing on its claims[.]"

26 S.W.3d 753, 757 (Tex. App. – Houston [14th Dist.] 2000, orig. proceeding) ("If the movant has proven there is an arbitration agreement, as a matter of law, the court must compel arbitration, and a presumption arises that all disputed issues between the parties must be arbitrated."). Furthermore,

> in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the [party']s claim . . . is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."

AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649-50, 106 S. Ct. 1415, 1419 (1986) (quoting *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 568, 80 S. Ct. 1343, 1346 (1960)).

Thus, once the parties presented the agreed order to compel arbitration and UCS moved to compel arbitration, the trial court should not have delayed in referring the case to arbitration to undertake further discovery matters and to enter orders attempting to curtail the proceedings before the arbitrators as a result of its discovery rulings. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909, 918 (1964) ("'[P]rocedural' questions

which grow out of the dispute and bear on its final disposition should be left to the arbitrator.").[7]

Both the record and the arbitrators' decision reflect, however, that notwithstanding the trial court's order, the arbitrators ultimately considered all of UCS's evidence – not just the matters set forth in its interrogatory responses. In particular, although DSI objected that UCS's presentation of evidence to the arbitration panel exceeded the scope of its February 21, 2001 interrogatory responses, in contravention of the trial court's May 9, 2002 order, the arbitrators allowed UCS to adduce two weeks of testimony. UCS neither contended that it had additional evidence to present nor objected that the arbitrators had precluded it from introducing any further evidence because of the trial court's order. Moreover, UCS did not argue in closing that its ability to present evidence was restricted.[8]

The arbitration panel majority made extensive findings of fact. It then presented alternative grounds to support its judgment. First, it concluded that the trial

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[7] In their brief, appellees contend that the trial court had the authority to enter the May 9, 2002 order under section 171.086 of the Texas General Arbitration Act, which enables a court to enter any order "needed to permit the arbitration to be conducted in an orderly manner and to prevent improper interference or delay of the arbitration." TEX. CIV. PRAC. & REM. CODE ANN. § 171.086(a)(6) (Vernon 2005). However, the trial court issued the May 9, 2002 order to resolve the parties' existing discovery dispute – not to facilitate the arbitration proceeding pursuant to section 171.086. As such, we reject appellees' contention that the trial court acted within its statutory authority.

[8] In fact, at the close of the arbitration hearing, UCS's Chairman and CEO told the panel, "I thank you-all for your attention. It's been a long three weeks. You-all have seen lots of paper. I appreciate the fact that you-all have given us a hard lesson. I feel like I have had my day in court."

court's order kept UCS from raising the evidence to support a trade secret misappropriation claim. Second, the panel concluded that appellees did not misappropriate trade secrets, after considering *all* of UCS's evidence:

> Even if UCS's evidence describing its alleged trade secret were not limited to UCS's February 21 Responses, UCS's evidence at trial demonstrated, at most, that some defendants obtained from the UCS system a partial list of UCS data fields, features, and functionalities. These do not constitute the overall architecture, structure, and design of the UCS system as a whole. Furthermore, in light of the unrebutted direct evidence of the substantial differences between CARMan and UCS, the circumstantial evidence presented by UCS as to misappropriation and use does not meet UCS' burden to prove these elements by a preponderance of the evidence.

We therefore hold that UCS has not shown that the trial court's May 9, 2002 order probably caused the rendition of an improper judgment, because the arbitration panel majority alternatively concluded that UCS did not meet its burden based upon the evidence. *See* TEX. R. APP. P. 44.1(a)(I) ("No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of probably caused the rendition of an improper judgment[.]").

The Arbitration Decision

UCS contends that the arbitrators made a gross mistake by (1) ignoring the plain and unambiguous language of the license agreement between UCS and Sterling

McCall, (2) failing to address three Texas cases involving trade secret waiver, (3) finding that DSI did not use UCS's trade secrets, (4) failing to recognize disgorgement damages, and (5) finding that UCS's trade secret misappropriation claim is preempted by federal copyright law. Appellees respond that because the parties agreed the Texas General Arbitration Act[9] governs this, arbitration, the Texas common law "gross mistake" standard is inapplicable. Rather, appellees assert, UCS is confined to raising one or more of the four exclusive grounds for vacatur set forth in the Texas General Arbitration Act.

We agree that the Texas General Arbitration Act governs this dispute. Although the arbitration provision contained in the license agreement between UCS and Sterling McCall does not reference the Texas General Arbitration Act,[10] the parties' subsequent Agreed Order to Stay Action and Compel Arbitration specifically incorporates it:

> The final arbitration award shall be subject to appeal, by way of a motion to modify, correct or vacate all or any part of the award filed in this Court and, thereafter, to the courts of appeals having jurisdiction, pursuant to the Texas General Arbitration Act.
>
> To the extent not addressed herein, the rules of the Texas General Arbitration Act shall govern the arbitration.

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[9] TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.096 (Vernon 2005).

[10] The provision does state that "[i]f the arbiters fail to select a third [arbiter] within ten (10) days, or should either party hereto fail to select an arbiter, he shall be chosen by a District Judge serving Harris County, Texas."

We therefore conduct our review under the Texas General Arbitration Act.

Pursuant to the Texas General Arbitration Act, a court may vacate an arbitration award under only four circumstances: (1) "the award was obtained by corruption, fraud, or other undue means;" (2) there was evident partiality, corruption, or willful misconduct by an arbitrator that prejudiced the rights of a party; (3) the arbitrators exceeded their powers, refused to postpone the hearing on good cause shown, refused to hear material evidence, or conducted the hearing in a substantially prejudicial manner; or (4) "there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection."[11] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(1)-(4) (Vernon 2005). UCS does not contend any of these circumstances apply to this arbitration proceeding.

Appellees urge that UCS is limited to these statutory grounds for vacatur, and thus UCS's appeal is without merit. We note, however, that the Texas Supreme Court recently declined an invitation to hold that a party governed by the Texas General Arbitration Act is limited to the statutory grounds for vacatur and cannot rely upon the commonlaw "gross mistake" standard. *Callahan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002). After observing that "[n]either party disputes that the [Texas General Arbitration] Act governs the contract[,]" and "[t]he statutory grounds allowing a court

[11] Subchapter B governs motions and proceedings to compel or stay arbitration.

to vacate . . . an award are limited to those the Act expressly identifies[,]" the Texas Supreme Court "assume[d] without deciding that [petitioner] may rely on the gross mistake standard under the common law to attack the arbitrator's award[.]" *Id.* Thus, like the Texas Supreme Court, we assume without deciding that UCS may rely on the common law gross mistake standard in this case in seeking to set aside the trial court's confirmation of the arbitrators' decision.

Yet, our review of an arbitration decision is "extremely narrow" because Texas law favors arbitration. *IPCO-G.&C. Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252, 256 (Tex. App. – Houston [1st Dist.] 2001, pet denied). An arbitration award has the same effect as the judgment of a court of last resort,[12] and a reviewing court may not substitute its judgment for that of the arbitrators merely because it would have reached a different result. *JJ Gregory Gourmet Servs., Inc. v. Antone's Imp. Co.*, 927 S.W.2d 31, 33 (Tex. App. – Houston [1st Dist.] 1995, no writ). Because arbitration is favored as a means of dispute resolution, every reasonable presumption must be indulged to uphold the arbitrators' decision, and none is indulged against it. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002). Review is so limited that a court may not vacate an arbitration award even if it is based upon a mistake of fact or law. *Vernon E. Faulconer, Inc. v. HFI Ltd. P'ship*, 970 S.W.2d 36, 39 (Tex. App. – Tyler 1998, no pet.) (citing *Jamison & Harris v. Nat'l Loan Investors*, 939

[12] This is because "[s]ubjecting arbitration awards to judicial review adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes." *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

S.W.2d 735, 737 (Tex. App. – Houston [14th Dist.] 1997, writ denied)).

Texas common law allows a reviewing court to set aside an arbitration award "only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment." *IPCO*, 65 S.W.3d at 256 (quoting *Teleometrics Intl, Inc. v. Hall*, 922 S.W.2d 189, 193 (Tex. App – Houston [1st Dist.] 1995, writ denied)). "Gross mistake results in a decision that is arbitrary or capricious. An honest judgment made after due consideration given to conflicting claims, however erroneous, is not arbitrary or capricious." *Bailey & Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex. App. – Dallas 1987, writ ref'd n.r.e.). The party seeking to vacate an arbitration award has the burden of demonstrating how the arbitrators made a gross mistake. *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 267 (Tex. App. – Houston [14th Dist.] 1995, no writ).

UCS asserts that the arbitrators made a gross mistake for several reasons. First, UCS contends that the panel majority improperly ignored the license agreement between UCS and Sterling McCall as a whole, and instead adopted a "strained interpretation" that parsed out the individual phrases "software," "program," and "licensed copy" as including only the raw code. UCS insists that this interpretation cannot be squared with the purpose of the agreement – which was to keep the programs, software, and manifestations of the software confidential – and is "sufficiently absurd" to justify vacatur of the award. Appellees respond that the arbitration panel heard evidence, and properly found, that UCS publicly disclosed (1) the functionality of the UCS system, (2) the data items the UCS system uses to perform its operations, (3) the manuals

describing how the UCS system operates, (4) the screens displayed on the end user's terminal on the UCS system, and (5) the reports or output from the UCS system. Thus, appellees contend, the panel majority properly interpreted the license agreement narrowly.

It is not our province to determine the proper construction of the parties' license agreement. *See House Grain Co. v. Obst*, 659 S.W.2d 903, 907 (Tex. App. – Corpus Christi 1983, writ ref'd n.r.e.) (holding that "[i]t is not necessary for us to determine the proper construction of the contract between the parties" because to do so would allow the parties "to essentially relitigate the arbitration proceedings"). Instead, our review is limited to whether the arbitrators' failure to adopt UCS's interpretation of the license agreement constitutes bad faith or a failure to exercise honest judgment. The record contains conflicting evidence as to the interpretation and breach of the agreement. Thus, nothing before us suggests that the arbitrators acted in bad faith or failed to exercise honest judgment, both with respect to UCS's claim for misappropriation of trade secrets and its claim for breach of contract against Sterling McCall. We hold UCS's first ground for vacating the award to be without merit.

Next, UCS asserts that the arbitrators made a gross mistake, by failing to address three leading Texas cases regarding trade secret waiver.[13] According to UCS, the panel majority incorrectly found that UCS lost any trade secret protection by demonstrating the UCS system and

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[13] The authorities UCS identifies are *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958), *K&G Oil Tool & Service Co. v. G&G Fishing Tool Services*, 314 S.W2d 782 (Tex. 1958), and *Schalk v. State*, 823 S.W.2d 633 (Tex. Crim. App. 1991).

distributing software overviews to thousands of third parties without expressly obligating the third parties to maintain confidentiality. UCS also contends the arbitrators' finding that DSI did not use UCS's trade secrets because the DSI software is not a copy of the UCS system is a "gross distortion of well-settled law[.]" However, "[t]hese alleged errors in the application of substantive law by the arbitrators during the proceedings in arbitration are not reviewable by the court on a motion to vacate an award," *Jamison*, 939 S.W.2d at 737; *see also Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, 164 S.W.3d 438, 443 (Tex. App. – Houston [14th Dist.] 2005, no pet.) ("Any error of law made by the arbitrators . . . cannot be reviewed by a court confirming the award."). Thus, we hold UCS's second and third grounds for vacating the award to be without merit.

Next, UCS contends that the arbitrators made a gross mistake in refusing to recognize disgorgement damages as measured by the value of the stolen trade secret. The arbitration panel majority concluded that, even had UCS proven its trade secret misappropriation claim, UCS did not prove that it sustained actual damages, and any unjust enrichment damages were speculative. In *Callahan*, the Texas Supreme Court considered whether a failure to award damages constitutes a gross mistake. *Callahan*, 92 S.W.3d at 843-44. The arbitrator in *Callahan* determined that the defendant was liable for the plaintiff's defective driveway, but failed to award damages despite the record evidence about the costs plaintiff incurred to replace the driveway. *Id.* The Texas Supreme Court held as follows:

> [A]n arbitrator does not violate the common law simply by failing to award damages. *See Teleometrics Int'l, Inc. v. Hall*, 922 S.W.2d 189, 193 (Tex. App – Houston [1st Dist.] 1995, writ denied) (Gross mistake, as a common law ground for setting aside an arbitration award, is a mistake that implies bad faith or failure to exercise honest judgment.).

Id at 844. Likewise, we hold that the arbitrators in this case did not commit a gross mistake sufficient to set aside the arbitration award by failing to award damages to UCS. Thus, we hold UCS's fourth ground for vacating the award to be without merit.

Finally, UCS contends that the arbitrators made a gross mistake in finding that its trade secret misappropriation claim is preempted by federal copyright law. According to UCS, the arbitrators based their decision on an "impossibly strained interpretation" of *Butler v. Continental Airlines, Inc.*, 31 S.W.2d 613 (Tex. App. – Houston [1st Dist.] 2000, pet. denied), and, in any event, that decision is not the majority view outside Texas. ADP asserts that Texas adheres to the minority rule, and the arbitrators therefore properly followed *Butler* in holding that trade secret misappropriation claims involving the wrongful copying of computer software are preempted by federal copyright law. However, on cross-appeal, ADP maintains that, should we disagree with the arbitrators' conclusion, then ADP is entitled to an injunction against UCS, as automatically provided for in the arbitration decision.

As we have discussed, we simply may not review "alleged errors in the application of substantive law by the arbitrators." *Jamison*, 939 S.W.2d at 737; *see also Monday*

v. Cox, 881 S.W.2d 381, 385 (Tex. App. – San Antonio 1994, writ denied) ("The courts are not permitted to second-guess the correctness of an arbitrator's decision on the merits."). Rather, our review is confined to whether the record indicates the arbitrators acted in bad faith or failed to exercise honest judgment – not whether we agree or disagree with their application of the law.

Here, the arbitrators relied on four Texas state and federal cases[14] in deciding the preemption issue, and we find nothing in the record indicating that the arbitrators acted in bad faith or failed to exercise honest judgment. Thus, we hold UCS's fifth ground for vacating the award to be without merit and overrule the issue raised in ADP's cross-appeal.

Conclusion

We conclude that the trial court should not have issued a discovery order limiting the presentation of the evidence during the arbitration proceedings, but that the order did not affect the arbitrators' decision as to the merit of UCS's claims, and thus did not cause the rendition of an improper judgment. In addition, we conclude that the arbitrators did not commit a gross mistake in finding that UCS had failed to prove its trade secret misappropriation and breach of contract claims. Accordingly, we affirm the

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[14] *See Butler v. Continental Airlines, Inc.*, 31 S.W.3d 642 (Tex. App. – Houston [1st Dist.] 2000, pet. denied); *see also Butler v. Continental Airlines, Inc.*, No. CivA.01-2194, 2001 WL 1509545 (S.D. Tex. Nov. 19, 2001); *Microsource, Inc. v. Superior Signs, Inc.*, No. CIVA.3:97-CV-2733-G, 1998 WL 119537 (N.D. Tex. Mar. 9, 1998); *Butler v. Continental Airlines, Inc.*, 116 S.W.3d 286 (Tex. App. – Houston [14th Dist.] 2003, pet. denied).

judgment of the trial court confirming the arbitration award. All pending motions are denied as moot.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

[SEAL]

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

NOTICE OF ORDER ON MOTION

Cause number:	01-04-01088-CV
Style:	Universal Computer Consulting, Ltd.; Universal Computer Services, Inc.; and Dealer Computer Services, Inc.
	v Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc. ADP, Inc., Business Solutions, Inc., SMC Investment, Inc., Southwest Toyota, Inc., and SMC Luxury Cars, Inc.
Date motion filed*:	December 08, 2005
Type of motion:	Rehearing
Party filing motion:	Appellant (Universal Computer)
Document to be filed:	

Ordered that motion is:

☐ Granted
If document is to be filed, document due:

☐ The Clerk is instructed to file the document as of the date of this order

☐ Absent extraordinary circumstances, the Court will not grant additional motions to extend time

☑ **Denied**

☐ Dismissed (*e.g.*, want of jurisdiction, moot)

Judge's signature: Justice Jane Bland
☑ Acting for the Court

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

Date: **December 15, 2005**

Absent emergency or a statement that the motion is unopposed, must wait ten days before acting on motion except for motion to extend time to file a brief. *See* TEX. R. APP. P. 10.3(a).

Note: Single justice may grant or deny any request for relief properly sought by motion, except in a civil case a single justice should not: (1) act on a petition for an extraordinary writ or (2) dismiss or otherwise determine an appeal or a motion for rehearing. TEX. R. APP. P. 10.4(a).

Cause No. 99-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT
Plaintiffs	§	OF HARRIS COUNTY, TEXAS
v.	§	
DEALER SOLUTIONS, L.L.C., and DEALER SOLUTIONS HOLDINGS, INC.	§	
Defendants	§	133RD JUDICIAL DISTRICT

ORDER ~~VACATING~~ REFUNDING ARBITRATION AWARD

(Filed Dec. 12, 2003)

Came before the court Plaintiffs' Motion to Vacate the Arbitration Award. The Court finds that it has jurisdiction over the parties and subject matter involved and that the Motion to Vacate should be ~~granted~~ denied.

~~IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Arbitration Award dated November 25, 2003 is hereby vacated.~~

~~All relief not expressly granted is hereby denied.~~

Signed this 30 day of December, 2003.

/s/ Lamar McCorkle
PRESIDING JUDGE

NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., SMC INVESTMENTS, INC., SOUTHWEST TOYOTA, INC. D/B/A STERLING MCCALL TOYOTA, SMC LUXURY CARS, INC. D/B/A STERLING MCCALL LEXUS, BUSINESS SOLUTIONS, INC., AND ADP, INC.	§	133RD JUDICIAL DISTRICT

ORDER CONFIRMING ARBITRATION AWARD AND JUDGMENT

(Filed Nov. 26, 2003)

On November 26, 2003, Defendants Dealer Solutions, L.L.C., and Dealer Solutions Holdings, Inc., and Defendant-Counterclaimant ADP, Inc. filed a motion for entry of an Order confirming the November 25, 2003 Corrected Award of Arbitrators entered in this case and requesting this Court to render judgment on the Award. Defendants SMC Investments, Inc., Southwest Toyota, Inc., d/b/a Sterling McCall Toyota, SMC Luxury Cars, Inc., d/b/a Sterling McCall Lexus, and Business solutions, Inc. filed motions joining in the motion to confirm the Award and

enter judgment. The Court, having considered the motions, the response of Plaintiffs, Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc. and Dealer Computer Services, Inc., and all other material matters, finds and orders as follows:

1. Upon the agreement of all parties herein, the entire controversy between the parties set forth in the Plaintiffs' pleadings herein and the Defendants' answers thereto and any related claim or counterclaim that could be asserted by Plaintiffs against Defendants or by Defendants against Plaintiffs, including all claims subsequently asserted by the parties in pleadings filed by them in the arbitration proceeding, were submitted to arbitration pursuant to the Agreed Order to Stay Action and Compel Arbitration signed by this Court on July 29, 2002.

2. All of the claims of the parties were heard and finally determined by a three-arbitrator panel consisting of Alvin L. Zimmerman, Susan Soussan and Gary McGowan. The arbitration hearing was conducted from June 2, 2003 to June 20, 2003. Thereafter, on November 11, 2003, the arbitrators issued their Award of Arbitrators based upon the decision of two members of the arbitration panel, a copy of which is on filed [sic] in the papers of this case. On November 25, 2003, the arbitrators issued their corrected Award of Arbitrators, a copy of which is on file in the papers of this case. The Court finds that the Corrected Award of Arbitrators of the majority of the arbitrators should be confirmed and judgment entered thereon.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the November 25, 2003 Corrected Award of Arbitrators issued in this case is

confirmed, that Plaintiffs Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc. and Dealer Computer Services, Inc. take nothing by their claims and causes of action in the arbitration proceeding and this suit and that Defendants Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc., ADP, Inc., SMC Investments, Inc., Southwest Toyota, Inc., d/b/a Sterling McCall Toyota, SMC Luxury Cars, Inc., d/b/a Sterling McCall Lexus, and Business Solutions, Inc. be in all things discharged. It is, further,

ORDERED ADJUDGED and DECREED that Defendant-Counterclaimant ADP, Inc. take nothing by its claims and causes of action asserted in the arbitration proceeding and this suit, and that Plaintiffs-Counterdefendants Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc. and Dealer Computer Services, Inc. be in all things discharged. It is, further,

ORDERED that each party shall bear its own costs, expenses and attorneys' fees, as provided by the Award of Arbitrators.

All other relief not expressly granted herein is expressly denied. This is a final judgment, subject to appeal.

SIGNED this 30 day of December, 2003.

/s/ Lamar McCorkle
JUDGE PRESIDING

IN THE MATTER OF THE
ARBITRATION REFERRED FROM
CAUSE NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
vs.	§	
DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., and ADP, INC.	§	
Defendants,	§	HARRIS COUNTY, TEXAS
ADP, INC.,	§	
Counterclaimant,	§	
vs.	§	
UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	133RD JUDICIAL DISTRICT
Counterdefendants.	§	

CORRECTED AWARD OF ARBITRATORS

Parties:

1. Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services,

Inc., and Dealer Computer Services, Inc. (collectively referred to as "UCS") Plaintiff, represented by John C. Allen.

2. Dealer Solutions, L.L.C. and Dealer Solutions Holdings, Inc. (a defendant collectively referred to as "DSI"), represented by Robin L. Harrison of Campbell, Harrison & Wright, L.L.P.

3. SMC Investment, Inc. f/k/a SWT Investments, Inc., Southwest Toyota, Inc., d/b/a Sterling McCall Toyota and SMC Luxury Cars, Inc. d/b/a Sterling McCall Lexus (collectively referred to as "SMT"), a defendant represented by Michael P. Cash and Wade T. Howard of Cash * Allen, L.L.P.

4. ADP, Inc. ("ADP") a defendant and Counter Claimant represented by Robert A. Lewis and Geoffrey Holtz.

5. Business Solutions, Inc. ("BSI") a defendant represented by Christopher M. Brown of Jenkins & Gilchrist, P.C.

This corrected Award of Arbitrators merely corrects the names of the plaintiffs to include all of the named plaintiffs in the style of the case which is now contained in paragraph 1 above and typographical errors (spelling and the last phrase of paragraph 65 which has been omitted).

WE, A MAJORITY OF THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties and dated July 29, 2002, and the parties by letter agreement dated September 14, 2003, clarifying the time period to November 11, 2003 as the date for this Decision to be issued, and having been duly selected by the parties as arbitrators and having duly heard the proofs

and allegations of the Parties during three weeks of testimony, **FIND** as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence.

Copyright/Preemption

1. UCS has not registered any copyright for its system.

2. All of UCS's claims derive from Defendants' alleged copying, distribution, and display of the UCS software.

UCS Licensing Agreement

3. UCS licensed its software to SMT under an express, written licensing agreement, which UCS drafted. The licensing agreement prohibits only the copying and disseminating of "programs," "software," and the "Licensed Copy." The licensing agreement does not expressly require that any UCS system screen, screen print, data field, or report be kept confidential. Moreover, the agreement does not say that the features and functionality of the UCS system are confidential.

4. The licensing agreement defines "Program" as "[a] series of instructions that tell the computer how to perform a task." The licensing agreement defines "Software" as "[a] general term used to describe all programs used inside the computer to make it perform any function." The

licensing agreement provides: "Customer shall not copy (except for archive purposes), duplicate, disassemble or decompile the Licensed Copy or the Licensed Software or Materials."

5. In programming terminology, to disassemble is to convert a program in its executable (ready-to-run) form (sometimes called object code) into a representation in some form of assembler language so that it is readable by a human. In programming terminology, to decompile is to convert executable (ready-to-run) program code (sometimes called object code) into some form of higher-level programming language so that it can be read by a human.

6. The licensing agreement identifies only one "trade secret" – the UCS source or object code. No defendant saw any UCS source or object code.

UCS's Alleged Trade Secret

7. As stipulated by UCS and set forth in an order of the District Court, UCS's only alleged trade secret is the "overall structure, architecture and design of their computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter." May 9, 2002, Order.

8. The architecture of the UCS system as a whole includes all of the following: all data fields; how the data fields are collected together into logical records; the manner in which each software application is broken down into individual programs; the behavior of those programs; how the individual programs are integrated one to the other; and the report content, format, headings, sequence, totaling, and selection of the reports.

9. UCS's February 21, 2001 interrogatory answers, which purported to specifically describe UCS' alleged trade secret, do not describe the overall architecture, structure, and design of UCS's system.

Alleged Secrecy

10. UCS competitors have been viewing the UCS system for years. Competitors have looked at UCS data fields, manuals, and reports to convert dealership data, with no objection from UCS.

11. The UCS sales force has performed over 1000 demonstrations every year to third parties using the same software UCS licenses to customers. No limits were placed on what could be demonstrated. UCS maintained three "demo buses" that traveled the country demonstrating the UCS system to third parties. The buses carried the full UCS system on board, often demonstrating the system to a single dealership for two or three full days in a row. UCS often brought third parties to dealerships running the UCS software to view the system in use. Also, UCS brought third parties to UCS's Houston headquarters to see the system. UCS performed these in-house demonstrations as often as five to seven times per month, and they lasted as long as four days. In none of the above demonstrations were the viewers required to agree to keep the content of the demonstrations confidential.

12. UCS demonstrated its system at the annual NADA convention, showing the actual system on monitors that any attendee could view. UCS demonstration scripts taught its sales force how to perform in-depth reviews with third parties of hundreds of UCS screens and functions, including control screens. The demonstration scripts

were representative of what UCS allowed sales prospects to see with respect to its system. Demonstrations of its system were lengthy, comprehensive, and commonplace. Again, UCS did not require the attendees to sign a confidentiality agreement.

13. For each release of its system, UCS prepared a comprehensive Software Overview that it handed out to third parties. The UCS software overviews described the system in great detail, running as long as 600 pages. They contained numerous images of the UCS system screens as well as samples of reports and a discussion of the functionality of the system. UCS salespeople could obtain software overviews by requesting a copy from the marketing department or asking the UCS print shop for one. UCS maintained no records on who received a software overview and did not monitor the distribution of the overviews. UCS has handed out or shown its software overviews to at least several hundred third parties. Recipients often kept them to review and distribute as they pleased with no conditions.

14. When demonstrating its system or providing its software overviews to third parties. UCS rarely obtained any agreement, written or otherwise, that such information would be kept confidential. UCS rarely, if ever, mentioned that any information about its system was confidential before sharing it with others.

15. UCS's customer base has dwindled from 3000 dealers in 1994 to approximately 800 today. There are over 2000 former dealerships and tens of thousands of their employees who used the UCS system daily and therefore know its screens, fields, reports, and functionality.

16. UCS had no system in place to recover old manuals and made no effort to retrieve its user manuals from its thousands of former customers.

17. UCS's former customers have sent UCS user manuals to its competitors.

18. The UCS licensing agreement has no "survival clause," or a provision requiring confidentiality past the contract term.

19. UCS does not require dealers licensing its system to obtain a separate non-disclosure agreement from their employees.

20. UCS has publicly disclosed:

(a) the functionality of the UCS system – what it does.

(b) the data items or data elements the UCS system uses to perform its operations.

(c) the manuals that describe the operations of the UCS system and the contents of those manuals.

(d) the screens displayed on the end user's terminal on the UCS system.

(e) the reports or output from the UCS system.

21. It is industry practice in the DMS ("dealer management system") industry to obtain competitors' manuals, to obtain demonstration of competitors' systems, to talk about competitors' systems and to access competitors' systems for the purposes of learning what the systems do (functionality), the data items that it uses and the output that it generates.

22. It is industry practice in the DMS industry to add data items or functionality to a DMS based upon what a competitor's system does.

Defendants' Access to the UCS System

23. SMT licensed and had access to only 25 of the more than 117 applications in the UCS system. In addition, much of the UCS system was unavailable to any end user, such as internal control programs which could only be accessed by UCS, not SMT or any other dealer, and which alone included thousands of functionalities.

24. UCS did not support the primary manufacturer interface with Toyota used by SMT. SMT interfaced with Gulf States Toyota's proprietary system to order parts and track vehicle inventory with a stand-alone system, not through UCS.

25. SMT did not use the UCS sales prospecting system, and instead used a program custom-designed by a sales consultant, John Traver. DSI licensed Traver's methods for inclusion in the CARMan system.

26. SMT did not use UCS's parts special ordering system, and instead used custom spreadsheets to track special orders.

27. SMT did not use UCS's special finance application, but instead used a custom program to manage this part of the business. UCS's special finance application was based on a third-party program from Gillman Pontiac.

28. SMT designed and used a custom program to manage its fleet operations.

29. UCS conceded that one would have to look at all 117 UCS applications to understand the alleged trade secret.

Designing and Developing CARMan

30. At its peak, more than 60 programmers and developers were at work on the CARMan system. The team devoted more than 200,000 man-hours to developing CARMan at a cost of over $30 million.

31. The two-and-a-half year development period for CARMan was in line with industry norms, and in fact took longer than one would expect given the resources.

32. Robert Brockman alone, working only with 5-6 programmers, created the full suite of UCS applications licensed to SMT in only three years.

33. UCS's evidence revolved primarily around the requirements definition ("RD") prepared by BSI for SMT early in the pre-development process. The RD describes the business processes that a dealership uses to run its business. It does not contain any confidential, proprietary or trade secret information of UCS. As Brockman admitted, the RD does not reflect the "overall architecture, structure, and design" of the UCS system. Rather, the RD comprises an effort to determine the cost and feasibility of developing the new software. The RD was not used in the design or development of the actual CARMan system.

Differences Between UCS and CARMan

34. UCS did not present evidence directly comparing the actual CARMan software with the UCS system. UCS's

sole expert witness on the issue of misappropriation, Robert Brockman, did not know the CARMan architecture, structure, and design as a whole, and did not do a comparison of CARMan and UCS architectures. UCS had an opportunity, through an independent expert witness, to examine the CARMan software but inexplicably chose not to do so.

35. The overall structure, architecture, and design of CARMan as a whole is substantially different from that of UCS. UCS was written in COBOL while CARMan was written in Powerbuilder. UCS runs on a mainframe with green-screen dumb terminals while CARMan runs on a client-server configuration with color PCs. UCS uses seven separate flat-file databases while CARMan uses a single relational database. UCS uses a text-based, batch data entry system where an entire screen of information must be filled in before it is sent to the mainframe for processing, while CARMAN uses an interactive, mouse-driven, graphical user interface with constant communication between the client and server. UCS has at least 117 separate applications with thousands of programs, while CARMan consists of 17 applications comprised of nine executable files.

36. A relational database as used in CARMan has built-in "relations" among the various data fields and includes a significant body of software that intervenes between the application and the files as they exist on the disk. A flat-file database, by contrast, is little more than a collection of individual fields with no "intelligence."

37. CARMan's graphical user interface is so fundamentally different from UCS's text-based, green screens that this alone compels stark differences between the

systems, requiring different designs in the application logic and databases.

38. A brief side-by-side comparison of the two systems revealed other obvious differences in their structure, architecture, and design: UCS has a single application to track new and used cars, while CARMan has two separate applications; CARMan has screens with tabs to bring up additional information, while UCS requires moving from screen to screen; CARMan has drop down windows to choose data to add, while UCS requires the user to memorize and enter arcane codes; CARMan can interface with other Windows applications because it uses an open architecture, while UCS is a closed system and does not permit this; CARMan has pop-up windows to add additional information, while UCS cannot provide these; CARMan has a single application to handle lease and finance transactions, while UCS has two separate applications; CARMan uses the computing power of the PC to calculate various financing options at the PC, while UCS requires that such data be sent to the mainframe, calculated there, and sent back to the terminal.

39. CARMan is a fraction of the size of UCS. The UCS system includes at least 117 applications, while CARMan only includes 17. The CARMan database includes 12,000 fields, while UCS's includes 30,000. CARMan includes only 50-60% of the functionality of ADP's Elite system, which is itself a smaller system than UCS. CARMan did not include the majority of the applications included in a graphical depiction of 26 of the 117 UCS applications that UCS handed out to the public as part of its software overviews.

40. CARMan included significant material that was derived from third parties. CARMan used off-the-shelf programs from Jetforms for forms management, Crystal Reports for report-generating, Padlock for security, and Traver for its guest management program. BSI built a custom "function painter," a complex programming tool that was embedded throughout CARMan to permit users to customize an infinite number of codes and calculations. Nothing of the sort is in UCS. A substantial number of data elements and features are driven by auto manufacturers, the IRS, credit bureaus, parts distributors, the department of transportation, and other entities.

"Confidential Information" Claim

41. UCS proved no damages from any alleged "misappropriation of confidential information."

Tortious Interference Claims

42. DSI was not formed until May, 1995, several months after the acts that UCS alleges were a breach of the UCS/SMT contract, and two months after the preparation of the March 3, 1995 "Requirements Definition" on which UCS premises this lawsuit.

43. UCS presented no evidence that ADP did anything until late 1998 when it entered into acquisition negotiations, long after SMT had stopped using the UCS software altogether.

44. Prior to the existence of DSI, SMT had already engaged in the acts that UCS alleges here to be a breach of the contract.

45. SMT was a willing participant in any conduct UCS claims to be a breach.

46. UCS's revenues and profits have increased, rather than decreased, since the occurrence of the conduct UCS alleges to be wrongful in this matter.

47. UCS presented no evidence that any former employee disclosed to BSI or DSI anything in which UCS had a property interest, much less the overall structure, architecture, and design of the UCS system as a whole.

48. UCS failed to present evidence that BSI or DSI knew the terms of any UCS employment contract.

49. UCS failed to present any evidence that BSI, DSI, or ADP specifically knew that any conduct of SMT constituted a misappropriation of any UCS trade secret.

Damages

50. Defendants have earned no profits from the alleged misconduct in this case. DSI lost approximately $35 million to $40 million from the time of the alleged misappropriation of UCS's trade secret to the 1999 merger with ADP. ADP has spent approximately $140 to $150 million between its acquisition of DSI and its further development of its next generation product which is planned to rework and incorporate parts of the CARMan software. ADP has not marketed the CARMan software or any product that has any relationship to the CARMan software.

51. The stock acquisition price for ADP's purchase of DSI's stock was paid by ADP to individual DSI shareholders, and not to DSI.

52. UCS's expert's damages methodology and calculations are based on the assumption that the CARMan software and the proposed next generation Jupiter software copy the structure, architecture and design of the UCS system as a whole. The CARMan software does not copy the structure, architecture and design of the UCS system as a whole. The Jupiter software does not copy the structure, architecture and design of the UCS system as a whole.

53. ADP's Jupiter product was planned to incorporate only part of the CARMan software, and it was to be substantially different from CARMan.

54. UCS proved no actual damages as a result of any alleged breach of the licensing agreement.

Statute of Limitations

55. The acts that UCS alleges were tortious commenced in 1994, when employees of BSI began the initial Phase I analysis at SNIT and allegedly viewed part of the UCS system. The resulting "requirements definition," listing UCS screen names, was completed on March 3, 1995.

56. CARMan was publicly revealed to the world at the 1996 AIADA convention and to various dealers that year, and made its formal public debut with fanfare in January, 1997 at the annual NADA convention. UCS was aware of this. CARMan was displayed in the center of the convention in a 3,000 square foot booth with the actual CARMan program presented on a cinema-like video screen. Numerous UCS employees, including Robert

Brockman and Robert Nalley, were in attendance, saw the display, and picked up CARMan marketing materials.

ADP Claims

57. ADP only licenses the object code for its Elite dealership management software under a strict confidentiality obligation and never provides the code to non-customers. The Elite object code is valuable property, generating large amounts of licensing revenue for ADP.

58. UCS possessed an ADP 8500 system on the third floor of UCS's Hollister building. UCS possessed an ADP system maintained on the first floor of the UCS Dacoma building.

59. UCS powered on the ADP systems it possessed.

60. UCS used the ADP systems it possessed to generate printouts of ADP's data structure and to create programs to run on ADP systems using the ADP Data Basic language.

61. UCS routinely accesses and runs ADP systems through a dial-up modem from UCS's headquarters without ADP's permission.

62. UCS's November 22, 2002 "ADP System Competitors' Equipment Manual," spells out the steps which a UCS employee should follow to override ADP's security features and log onto the ADP software from the UCS offices using a terminal emulator.

63. UCS possessed ADP systems for at least 5 years, between 1990 and 1995, and perhaps to the present.

64. Accessing a competitor's software at a dealership's site for purposes of converting the dealer's data from one system to another is an acceptable, common practice in the industry. UCS runs ADP's code from UCS's offices where it develops its competing system, which is not an acceptable, common practice and is improper.

65. Although UCS may have misappropriated an ADP 8500 system, the evidence does not show that ADP used the system in such a way that UCS would owe ADP a royalty.

CONCLUSIONS OF LAW

Copyright

66. UCS's claim under the Copyright Act fails because UCS provided no evidence that it has registered any copyright, a prerequisite to maintaining a copyright infringement action. 17 U.S.C. § 411(a); *Creations Unlimited, Inc. v. McCain*, 112 F.3d 814, 816 (5th Cir. 1997).

67. UCS's claim under the Copyright Act fails because UCS provided insufficient evidence that any defendant reproduced the UCS system. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447, 104 S.Ct. 774 (1984); *Engineering Dynamics*, 26 F.3d at 1347.

Breach of Contract

68. The licensing agreement under which UCS licensed its software to SMT obligates SMT only to keep the computer code of the UCS system confidential.

69. Any ambiguity in the licensing agreement must be construed against UCS, the party that drafted the agreement.

70. There was no breach of the licensing agreement's confidentiality obligation because no defendant saw or copied any UCS computer code.

Misappropriation of Trade Secrets

71. UCS had the burden to establish the following elements of its claim for misappropriation of trade secrets: (a) the existence of a trade secret; (b) that defendants misappropriated the trade secret through improper means; (c) that defendants used the trade secret; and (d) damages. *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991).

72. To establish the existence of a trade secret, UCS had the burden to prove that it has kept it secret. *Tom James of Dallas, Inc. v. Cobb*, 109 S.W3d 877, 2003 WL 21564415 (Tex.App. – Dallas, July 11, 2003, no writ); *Luccous v. J.C. Kinley Co.*, 376 S.W.2d 336, 338 (Tex. 1964).

73. Under the Order of May 9, 2002, the only trade secret claimed by UCS is the overall structure, architecture and design of its computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter. May 9, 2002 Order. UCS's evidence identifying and describing the claimed trade secret is limited to its interrogatory responses served on February 21, 2001. May 9, 2002 Order. Because UCS's February 21, 2001 interrogatory responses do not in fact

describe overall structure, architecture and design of the UCS computer system as a whole, UCS is barred from proving the necessary element of a claim for misappropriation of trade secrets.

74. Even if UCS's evidence describing its alleged trade secret were not limited to UCS's February 21 Responses, UCS's evidence at trial demonstrated, at most, that some defendants obtained from the UCS system a partial list of UCS data fields, features, and functionalities. These do not constitute the overall architecture, structure, and design of the UCS system as a whole. Furthermore, in light of the unrebutted direct evidence of the substantial differences between CARMan and UCS, the circumstantial evidence presented by UCS as to misappropriation and use does not meet UCS' burden to prove these elements by a preponderance of the evidence.

75. UCS has failed to establish the existence of a trade secret other than its code, which was not misappropriated by defendants.

76. To meet its burden of adequately identifying its alleged trade secret, UCS had to describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade. May 9, 2002 Order; June 15, 2000 Order; *IDX Systems Corp. v. Epic Systems Corp.*, 285 F.3d 581, 583 (7th Cir. 2002); *Imax Corp. v. Cinema Technologies, Inc.*, 152 F.3d 1161, 1167 (9th Cir. 1998); *ECT Int'l, Inc. v. Zwerlein*, 228 Wis.2d 343, 349-50 (Wis.App. 1999); *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1203 (7th Cir. 1987); *Diodes, Inc. v. Franzen*, 260 Cal.App.2d 244, 253 (Cal.App. 1968).

77. The evidence failed to describe the alleged UCS trade secret with the requisite specificity. UCS provided evidence about only a small percentage of the overall structure, architecture and design of the UCS computer system as a whole. UCS made not [sic] effort to separate its alleged trade secret from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade. Numerous data fields about which UCS provided testimony are generic and common to any dealership management software. Data record information is not provided. Application breakdown to programs is not provided. Integration and program behavior are not provided. Report content, selection, sequences and headings are not provided.

78. UCS did not meet its burden of proof to establish use of its alleged trade secret – that CARMan was a copy of UCS or substantially derived from it.

79. Merely comparing UCS and CARMan data fields would not establish that the overall structure, architecture and design of the systems were the same.

80. There is no trade secret protection for matters that are generally known in an industry. *Southwest Research Institute v. Keraplast Technologies, Inc.,* 103 S.W.3d 478, 482 (Tex.App. – San Antonio 2003, no writ).

81. If a secret is disclosed to a third party, trade secret protection is lost unless the disclosure was under circumstances imposing a duty on the other party not to disclose the secret or use it. Disclosure to any third party, not just competitors, destroys a trade secret. *Tom James of Dallas, Inc. v. Cobb,* 109 S.W.3d 877, 2003 WL 21564415 (Tex.App.–Dallas, July 11, 2003, no writ); *Hurst v. Hughes Tool Co.,* 634 F.2d 895, 899-90 (5th Cir. 1981); *Lawfinders*

Associates, Inc. v. Legal Research Center, Inc., 65 F. Supp. 2d 414, 421-23 (N.D. Tex. 1999); *Adeliphon, Inc. v. DiRico*, 1992 WL 281395, *3 (N.D. Tex. Mar. 22, 1992); *Integral Systems, Inc. v. Peoplesoft, Inc.*, 1991 WL 498874, *16 (N.D. Cal. July 19, 1991).

82. There is no general implied duty for a party receiving information to maintain it in secrecy. If a disclosure is alleged to have been made in confidence, the person receiving the information must be told that the secret is being revealed to him on the condition that he is under a duty to keep it confidential, and he must agree to do so. *Fury's, Inc. v. United Speciality Advertising Co.*, 385 S.W.2d 456, 459-60 (Tex.App.–El Paso 1964, writ ref'd n.r.e.); *Hurst v. Hughes Tool Co.*, 634 F.2d 895, 898 (5th Cir. 1981).

83. In the absence of a survival clause, a party has no obligation to abide by a contract's provisions after the contract term has ended. This rule also applies to a confidentiality provision. *Expansion Plus, Inc. v. Brown-Forman Corp.*, 132 F.3d 1083, 1086 (5th Cir. 1998); *All West Pet Supply Co. v. Hill's Pet Prods. Div.*, 840 F. Supp. 1433, 1436-37 (D. Kan. 1993); *See also Griffin Indus., Inc. v. Foodmaker, Inc.*, 22 S.W.3d 33, 36 (Tex.App. – Houston [14th dist.] 2000, pet. denied).

84. Ex-employees of dealerships licensing the UCS system are not bound by the UCS dealership contract or any confidentiality provision. *Texas Shop Towel v. Haire*, 246 S.W.2d 482, 484 (Tex.App.–San Antonio 1952, no writ); *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1264 (7th Cir. 1992).

85. UCS lost any trade secret protection by (a) publicly disclosing its alleged secret to third parties with

no obligation to maintain it in confidence, (b) failing to require former customers to keep information about the UCS system confidential, and (c) failing to require former employees of customers to keep information about the UCS system confidential.

Misappropriation of Confidential Information

86. Texas does not recognize a cause of action for misappropriation of "confidential" information that is not a trade secret. *Stewart & Stevenson Serv's, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 99 (Tex. App.–Houston [14th Dist.] 1994, writ denied).

87. A contract that purports to obligate one to keep information "confidential" is unenforceable when, in fact, the information is not confidential. *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 266 (Tex.App.–Houston [1st Dist.] 1996, no writ); *Anderson Chemical Co., Inc. v. Green*, 66 S.W.3d 434, 442-43 (Tex. App.–Amarillo 2001, no pet.); *Rimes v. Club Corp. of America*, 542 S.W.2d 909, 913 (Tex.App.–Dallas 1976, writ ref'd n.r.e.); *see also Hickory Specialties, Inc. v. Forest Flavors Int'l, Inc.*, 26 F. Supp. 2d 1029, 1032 (M.D. Tenn. 1998); *Dynamics Res. Corp. v. Analytic Sciences Corp.*, 400 N.E.2d 1274, 1288 (Mass. App. 1980).

88. UCS has destroyed any confidentiality by publicly disclosing its alleged "confidential information."

89. UCS failed to present any evidence of damages for misappropriation of "confidential information," and thus failed to prove a necessary element of any such claim.

Tortious Interference

90. To recover for tortious interference with an existing contract, UCS had the burden to prove: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) that the act was the proximate cause of the plaintiff's damages; and (4) that actual damage or loss occurred. *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 109 (Tex. App.–El Paso 1997, pet. denied).

91. There was no breach because the UCS licensing agreement requires only code to be kept confidential, and no defendant saw or copied any UCS code. Where there was no breach to begin with, there can be no tortious interference. *Bank One, Texas, NA. v. Stewart,* 967 S.W.2d 419, 447 (Tex.App.–Houston [14th Dist.] 1998, pet. denied).

92. DSI did not interfere with the UCS/SMT contract because DSI was not formed until May, 1995, several months after the acts that UCS alleges breached the UCS/SMT contract, and more than two months after the preparation of the March 3, 1995 "Requirements Definition."

93. ADP did not interfere with the UCS/SMT contract because ADP had no involvement until late 1998 when it entered into acquisition negotiations, long after SMT had stopped using the UCS software altogether.

94. UCS failed to prove SMT would not have committed the alleged breach absent any action by DSI or ADP. Evidence that a defendant's actions did not cause the breaching party to breach a contract negates this claim.

Top Value Enter., Inc. v. Carlson Mktg. Group, Inc., 703 S.W.2d 806, 812 (Tex. App.–El Paso 1986, writ ref'd n.r.e.).

95. A necessary element of UCS's cause of action for tortious interference is a showing that Defendants took an active part in persuading SMT to knowingly breach its contract with UCS. Merely entering into a contract with SMT with the knowledge of SMT's contractual obligations to UCS is not the same as inducing a breach. *Davis v. HydPro, Inc.*, 839 S.W.2d 137, 139 (Tex. App.–Eastland 1992, writ denied); *John Paul Mitchell Sys. v. Randalls Food Markets, Inc.*, 17 S.W.3d 721, 730 (Tex. App.–Austin 2000, pet. Denied); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993).

96. The only damages recoverable for tortious interference are actual damages. *Davis v. West Comm. Hosp.*, 755 F.2d 455, 467 (5th Cir. 1985).

97. Defendants did not willfully and intentionally interfere with the UCS contract with SMT.

98. Defendants' conduct was not the proximate cause of any breach of contract by SMT.

99. UCS incurred no damages as the result of any interference with the contract with SMT.

100. Defendants did not willfully and intentionally interfere with any UCS employment contract.

101. Defendants' conduct was not the proximate cause of any breach of any UCS employment contract.

102. UCS has proven no damages as the result of any interference with a UCS employment contract.

Statue [sic] of Limitations

103. To the extent such a claim exists, the limitations period on UCS's claim for "misappropriation and conversion of confidential information" is two years. *See* Tex. Civ. Prac. & Rem. Code § 16.003; *Daboud b* [sic]. *Gibbons,* 42 F.3d 285, 290 (5th Cir. 1995); *R. Ready Prods., Inc. v. Cantrell,* 85 F.Supp.2d 672, 593 (S.D. Tex. 2000); *HECI Exploration Co. v. Neel,* 982 S.W.2d 881, 885 (Tex. 1998).

104. The limitations period on UCS's claim for unfair competition is two years. *See* Tex. Civ. Prac. & Rem. Code § 16.003§; *R. Ready Prods., Inc., v. Cantrell,* 85 F.Supp.2d 672, 693 (S.D. Tex. 2000); *Edmark Indus. SDN. BHD v. South Asia Int'l (H.K.) Ltd.,* 89 F. Supp. 2d 840, 847 n. 2, 848 (E.D. Tex. 2000).

105. The limitations period on UCS's claim for unjust enrichment is two years. *See* Tex. Civ. Prac. & Rem. Code § 16.003§; *HECI Exploration Co. v. Neel,* 982 S.W.2d 881, 885 (Tex. 1998).

106. The limitations period on UCS's claim for tortious interference with contract is two years. See Tex. Civ. Prac. & Rem. Code § 16.003§; *Snell v. Sepulveda,* 75 S.W.3d 142, 144 (Tex. App. – San Antonio 2002, no pet.); *In the Matter of Coastal Plains,* 179 F.3d 197, 215 (5th Cir. 1999); *Elec. Bankcard Sys., Inc. v. Retriever Indus., Inc.,* 2003 WL 204717, *7 (Tex.App. – Houston [1st Dist.] 2003).

107. The limitations period on UCS's claim for conspiracy is two years. Tex. Civ. Prac. & Rem. Code § 16.003§; *Stroud v. VBFSB Holding Corp.,* 917 S.W.2d 75, 82 (Tex.App. – San Antonio 1996, writ denied); *Little v. Smith,* 943 S.W.2d 414, 421 (Tex. 1997).

108. The alleged wrongful acts of Defendants began in late 1994, five years before UCS commenced its lawsuit.

109. Even where the discovery rule applies, these causes of action would have accrued no later than January, 1997, when UCS "knew, or exercising reasonable diligence, should have known of the facts giving rise to a cause of action." *Wagner & Brown, Ltd. v. Horwood,* 58 S.W.3d 732, 735 (Tex. 2001); *HECI Exploration,* 982 S.W.2d at 886.

110. UCS was reasonably aware of all facts to put it on notice of any alleged wrongful conduct by Defendants no later than January, 1997, when DSI demonstrated and advertised CARMan to the general public and UCS at the NADA convention.

111. All UCS state law claims other than trade secret misappropriation (three-year limitations period) and breach of contract (four-year limitations period) are time-barred.

Damages

112. Appropriate measures of damages recoverable by a plaintiff alleging misappropriation of trade secrets include (1) the plaintiffs lost profits on lost sales; (2) the defendant's actual profits attributable to sales of the trade secret; (3) the "reasonable royalty" measure of damages; or (4) cost savings achieved by the defendant from its use of the plaintiff's trade secret. *University Computing Co. v. Lykes-Youngstown Corp.,* 504 F.2d 518, 535-539 (5th Cir. 1974); *Restatement of the Law* (Third) *Unfair Competition* § 45 (1995).

113. UCS's claim for lost profits was stricken before trial, and its expert witness did not perform any lost profits analysis.

114. UCS's damages expert witness testified that she did not perform a "reasonable royalty" damages analysis.

115. There was no proof of any cost savings to DSI or ADP as a result of the alleged misappropriation of UCS's system's architecture, structure and design.

116. Recovery for "unjust enrichment" is not available where the defendant has not made a profit, but has lost money. *Schuhart & Assocs. v. Solo Serve,* 1983 WL 1147, *23 (W.D. Tex. 1983); *Elcor Chem. Corp. v Agri-Sul,,* 494 S.W.2d 204, 213-14 (Tex. Civ. App.–Dallas, 1973, writ ref'd n.r.e.).

117. UCS damages methodology is unreliable. First, it incorrectly assumes that DSI was the recipient of the acquisition price and was enriched by that amount. However, the stock acquisition price was paid by ADP to individual DSI shareholders, not to DSI. Second, UCS's unjust enrichment calculation relies on the acquisition price of the stock of DSI, a speculative measure. Third, it wrongly assumes that the CARMan software has the same structure, architecture and design as UCS's system and that the UCS system architecture, structure and design was the only thing ADP sought to obtain in acquiring DSI. Fourth, it wrongly assumes DSI's organization and workforce were unimportant to ADP's decision to acquire DSI. Fifth, it wrongly assumes that ADP gave no value to the fact that CARMan had a graphical user interface and a relational database structure. Sixth, no attempt was made by UCS to apportion the price paid for DSI to any portion of the CARMan software UCS contends includes its trade

secret, DSI's workforce, or other assets of DSI. Seventh, UCS's expert computed its damages claim on the basis of 1999 projections that were shown at trial to be speculative when they were made and, in the light of the facts known now, simply wrong. Eighth, UCS's calculations wrongly were based on 1999 projections of sales of ADP's still unreleased Jupiter product although the claimed misappropriation occurred in 1995. *Alcatel USA, Inc. v. Cisco Systems, Inc.*, 239 F. Supp. 2d 660 (E.D. Tex. 2002); *Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1376 (Fed Cir. 2002).

118. A party asserting a claim for damages must establish its damages by competent evidence, with reasonable certainty. The fact finder may not assess an amount neither authorized nor supported by evidence, and there must be a rational basis for the calculation. *Holland v. Hayden*, 901 S.W.2d 763, 766 (Tex. App.–Houston [14th Dist.] 1995, writ denied). *Hughes v. Houston Northwest Medical Center, Inc.*, 680 S.W.2d 838, 842 (Tex. App.–Houston [1st Dist.] 1984, no writ); *First State Bank v. Keilman*, 851 S.W.2d 914, 930 (Tex. App.–Austin, 1993, writ denied); *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 372 (5th Cir. 2000); *Formosa Plastics Corp., USA v. Material Partnerships, Inc.*, 2002 WL 31388106 (Tex. App.–Houston [1st Dist.] 2002, no pet. hist.).

119. Texas law does not permit the recovery of unjust enrichment damages on the basis of anticipated benefits. Rather, unjust enrichment damages must be based on actual benefits received. Speculation about anticipated profits is not sufficient. *Schuhart & Assoc. v. Solo Serve*, 1983 WL 1147, *23 (W.D. Tex. 1983); *Elcor Chem. Corp. v Agri-Sul,*, 494 S.W.2d 204, 214 (Tex. Civ. App.–Dallas,

1973, writ ref'd n.r.e.); *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 536 (5th Cir. 1974); *Alcatel USA, Inc. v. Cisco Systems, Inc.*, 239 F. Supp. 2d 660 (E.D. Tex. 2002).

120. UCS failed to present any evidence of damages on any claim other than UCS's claim of misappropriation of its overall architecture, structure, and design as a whole.

121. Unjust enrichment is not recognized as a measure of damages for any of UCS's claims other than those for misappropriation of trade secrets. As to all of the other counts, evidence of actual damages incurred by UCS is required. *Marcus, Stowell & Beve v. Jefferson Investment Corp.*, 797 F.2d 227, 232 (5th Cir. 1986) (tortious interference); *Johnny Stewart Game Calls, Inc.*, 865 S.W.2d at 218 (common law misappropriation and unfair competition); *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d at 147 (conversion); *Alford-Chevrolet-Geo v. Jones*, 91 S.W.3d 396, 402 (Tex. App.-Texarkana, 2002) (civil conspiracy); Tex. Civ. Prac. & Rem. Code § 134.005 (statutory theft of trade secrets).

122. UCS has failed to establish recoverable damages against defendants.

123. Recovery of punitive damages requires a showing of actual damages as well as malice. *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995; Tex. Civ. Prac. & Rem. Code § 41.001(7).

124. UCS's claim for punitive damages fails because it has no actual damages.

Injunctive Relief

125. Permanent injunctive relief is an extraordinary remedy, proper only upon a showing by the plaintiff of a wrongful act, imminent harm, irreparable injury, and the absence of an adequate remedy at law. *Triantaphyllis v. Gamble,* 93 S.W.3d 398, 267-68 (Tex. App.–Houston [14th Dist.] 2002, pet. denied).

126. A defendant cannot be enjoined from using non-trade secret information in its business, or from using trade secrets it has not taken or threatened to take. *Gonzalez v. Zamora,* 791 S.W.2d 258, 267-68 (Tex. App.–Corpus Christi 1990, no writ); *Jordan v. Landry's Seafood Restaurant, Inc.,* 89 S.W.3d 737, 741 (Tex. App.–Houston [1st Dist.] 2002, pet. denied).

127. A permanent injunction must not grant relief which is not prayed for in a sworn application, and an injunctive order must set forth implicit notice of precisely what conduct is prohibited. Trade secret injunctions that are too vague are invalid. Tex. R. Civ. P. 683; *Gonzalez v. Zamora,* 791 S.W.2d 258, 267 (Tex. App.–Corpus Christi 1990, no writ); *American Can Co. v. Mansukhani,* 742 F.2d 314, 332 (7th Cir. 1984).

128. UCS has failed to articulate any conduct that could be enjoined with the specificity required by the Due Process Clause and Tex. R. Civ. Proc. 683.

Preemption

129. Given the above findings and conclusions, it is unnecessary to reach the preemption issue in this case. Nevertheless, since it has been extensively briefed by the parties, we set forth our preemption conclusions below.

130. The Copyright Act preempts state law claims where the work in which the right is asserted comes within the subject matter of copyright as defined in 17 U.S.C. sections 102 and 103 and the right that the author seeks to protect is equivalent to any of the exclusive rights within the general scope of copyright as specified by 17 U.S.C. section 106. 17 U.S.C. § 301; *Alcatel USA, Inc. v. DGI Techs., Inc.,* 166 F.3d 772, 785-867 (5th Cir. 1999).

131. Computer software, including the "structure, architecture and design" of a program, falls within the subject matter of copyright. *Kepner-Tregoe, Inc. v. Leadership Software, Inc.,* 12 F.3d 527, 536 n.20 (5th Cir. 1994); *Engineering Dynamics, Inc. v. Structural Software, Inc.,* 26 F.3d 1335, 1341 (5th Cir. 1994), *opinion supplemented on denial of rehearing by* 46 F.3d 408 (5th Cir. 1995); *Computer Management Assistance Co. v. DeCastro, Inc.,* 220 F.3d 396, 400 (5th Cir. 2000).

132. A state law right is equivalent to the plaintiff's copyright rights when the core of the state law theory of recovery goes to wrongful copying, i.e., if the elements of the state law cause of action would not establish qualitatively different conduct by the defendant than the elements for an action under the Copyright Act. *Butler v. Continental Airlines, Inc.,* 31 S.W.3d 642, 651-52 (Tex.App.–Houston [1st Dist.] 2000, pet. denied); *Daboub v. Gibbons,* 42 F.3d 285, 289-90 (5th Cir. 1995).

133. Section 106 of the Copyright Act grants the holder of a copyright the exclusive right to reproduce, distribute, prepare derivative works, perform, and display the copyrighted work. Federal Copyright Act. 17 U.S.C. § 106.

134. When the Copyright Act preempts a state cause of action, the state cause of action ceases to exist and any claims must be brought in federal court as violations of the Copyright Act. *Butler v. Continental Airlines, Inc. (Butler II),* 2002 Copr.L.Dec. ¶ 28,369, 2001 WL 1509545, *2 (S.D. Tex. 2001); *Aldridge v. The Gap, Inc.,* 866 F.Supp. 312, 315 (N.D. Tex. 1994).

135. UCS's claim for misappropriation of trade secrets is preempted by the Copyright Act. *Butler I,* 31 S.W.3d at 51-52; *Butler v. Continental Airlines, Inc. (Butler II,* 2002 Copr.L.Dec. ¶ 28,369, 2001 WL 1509545 (S.D. Tex. 2001); *Butler v. Continental Airlines, Inc. (Butler III),* 2003 WL 21911160 (Tex.App.–Houston August 12, 2003); *Microsource, Inc. v. Superior Signs, Inc.,* 1998 WL 119537 (N.D. Tex. 1998).

136. UCS's claim for statutory theft is preempted by the Copyright Act. *Butler I,* 31 S.W.2d at 651; *see also Rosciszewski v. Arete Assocs., Inc.,* 1 F.3d 225, 230 (4th Cir. 1993).

137. UCS's claim for "misappropriation and conversion of confidential information" is preempted by the Copyright Act. *Butler I,* 31 S.W.2d at 651.

138. UCS's claim for unfair competition is preempted by the Copyright Act. *Alcatel USA, Inc. v. DGI Techs., Inc.,* 166 F.3d 772, 789 (5th Cir. 1999).

139. UCS's claim for unjust enrichment is preempted by the Copyright Act. *Butler I,* 31 S.W.3d at 651; *Tavormina v. Evening Star Prods., Inc.,* 10 F.Supp.2d 729, 734 (S.D. Tex. 1998).

140. UCS's claim for tortious interference with contract is preempted by the Copyright *Act. Gemcraft*

Homes, Inc. v. Sumurdy, 688 F.Supp. 289, 295 (E.D. Tex. 1988); *Higher Gear Group, Inc. v. Rockenbach Chevrolet Sales, Inc.,* 223 F.Supp.2d 953, 959 (N.D. Ill. 2002); *Aqua Bay Concepts, Inc. v. Grosse Point Bd. of Realtors,* 1992 Copr.L.Dec. ¶ 26,971, 24 U.S.P.Q.2d 1372 (E.D. Mich. 1992).

141. UCS's claim for conspiracy is preempted by the Copyright Act. *Cooper v. Sony Music Entertainment, Inc.,* 2002 WI, 391693, *4 (S.D. Tex. 2002); *Brown v. McCormick,* 23 F.Supp.2d 594, 608 (D. Md. 1998); *see also Carroll v. Timmers Chevrolet, Inc.,* 592 S.W.2d 922, 925-26 (Tex. 1989).

ADP's Claim

142. UCS regularly accessed and ran ADP's trade secret object code by dialing into ADP systems at dealerships using a modem and a terminal emulator from UCS's Houston headquarters, which is not a common practice in the industry and is a continuing misappropriation.

143. UCS's access to and running of ADP's object code from UCS's Houston headquarters causes imminent, irreparable harm to ADP, for which ADP has no adequate remedy at law.

144. Consistent with our above preemption conclusions regarding UCS's claims, we hold that ADP's misappropriation claim is preempted. If this legal conclusion is incorrect, ADP would be entitled to an injunction prohibiting UCS from running ADP's code from the UCS offices either by way of a dial-up modem or on a system it has misappropriated, or by any other means.

AWARD

Although we are denying all relief to UCS in this case, we are doing so only after considerable consternation. We are troubled by the evidence showing that employees of SMT promoted and facilitated the secret funneling of information about the UCS system to BSI/DSI. Nevertheless, we are not called upon to decide an issue of business ethics in the sometimes rough-and-tumble marketplace. Rather, we must determine whether the proven facts support the elements of proof needed for claims recognized under applicable law.

Accordingly, we the undersigned majority of the panel, **AWARD** as follows:

1. UCS shall take nothing on their claims.

2. ADP shall take nothing in its claims.

3. Each party bears their own costs, expenses, and attorneys' fees.

This **AWARD** is in full settlement of all claims submitted to this arbitration.

SIGNED this 25th day of November 2003

Respectfully submitted,

/s/ Alvin L. Zimmerman
Hon. Alvin L. Zimmerman,
Chairman

/s/ Gary V. McGowan
Gary V. McGowan

The dissenting opinion of the Honorable Susan S. Soussan is attached hereto.

DISSENT

I respectfully dissent from the opinion of the majority of the arbitrators. In my opinion, the preponderance of the evidence showed that the Defendants did not start with a "blank sheet" in creating their dealer management system, CarMan. CarMan would never have been created but for the existence of the UCS dealer management system. By viewing the screens and manuals of the UCS system, Defendants saw the functionality of the software, how it behaved and how the data fields interrelated. With this knowledge, they created CarMan. Furthermore the Requirements Document was the foundation for CarMan and was based on the UCS system. To say otherwise is contrary to the overwhelming evidence. The Requirements Definition was not merely a cost estimate or feasibility study. It was the "foundation for developing" CarMan and, as represented by the defendants in investment brochures, "an exhaustive functional and technical description" of the system. There was no documentary evidence that CarMan was developed independently.

It is also important to note that the agreement between UCS and SMT required that SMT not disclose or otherwise permit any other entity access to the Licensed Copy and make certain that its employees, agents, customers, vendors and guests be advised of the confidential nature of the Licensed Software and Materials. This SMT did not do.

1. By a preponderance of the evidence, UCS has established the required elements of a trade secret misappropriation in Texas: (a) a trade secret existed; (b) Defendants obtained access to the trade secret by breaching confidential relationship or by improper discovery; (c) Defendants used the trade secret; and

(d) UCS incurred damages. *See Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991).

2. By a preponderance of the evidence UCS's claimed trade secret falls within the proper definition of a trade secret: "any formula, pattern, device or compilation of information used in one's business, and which gives an opportunity to obtain an advantage over competitors who do not know or use it." *Taco Cabana*, 932 F.2d at 1123 (5th Cir. 1991). Further, the evidence establishes a trade secret under the six factors identified in *In Re Bass*, 46 Tex. Sup. J. 988; 2003 Texas LEXIS 114 (Tex. July 3, 2003).

3. UCS's software architecture, structure, and design is a trade secret because the information cannot be readily duplicated without involving considerable time, effort, or expense. *See Harbor Software, Inc.*, 887 F. Supp. at 91. The structure, architecture, and design of UCS's computer system satisfies the criteria for protectable trade secret status and the trade secret is sufficiently defined.

4. The overall design of a software program may be protected as a trade secret, even if the individual components of that program are common knowledge in the programming industry. *See Harbor Software, Inc.*, 887 F. Supp. At 90-91.

5. Even if the elements of UCS's software architecture, structure, and design are in the public domain, UCS's integration and application of those elements into a software application are protectable trade secrets. *See Novell v. Timpanagos Research Group, Inc.*, 46 U.S.P.Q. 2d 1197, 1213 (D. Utah 1998). *See also Anacomp, Inc., v. Shell Knob Services, Inc.*, 1994 U.S. Dist., Lexis 223, *23 (S.D.N.Y. 1994).

6. UCS need not prove that its computer system was novel in the patent law sense. UCS need only show that the particular architecture, structure, and design of its program is valuable, that it is not a matter of common knowledge or readily duplicated, and that it was developed and has been kept secret through UCS's efforts. UCS has met this burden *of* proof. *See Dickerman Associates, Inc.*, 594 F.Supp. at 35.

7. By a preponderance of the evidence, effective measures were taken by UCS to maintain substantial secrecy, including but not limited to license agreements, non-disclosure agreements, plant security, access to information, and other measures. *See McGowan v. State*, 938 S.W.2d 732, 737 (Tex. App. – 14th [Hous.] 1996) (citations omitted), *aff'd sub nom., Weightman v. State*, 975 S. W. 2d 621 (Tex. Crim. App. 1998).

8. The economic value of the information – the fact that the information provided UCS with an advantage over competitors who did not have the information – is a factor weighing in favor of finding the existence of a trade secret. *See Metallurgical Indus.*, 790 F.2d at 1201; *Zoecon Industries*, 713 F.2d at 1179. UCS's trade secret information possessed "at least that modicum of originality which will separate it from everyday knowledge." *Phillips*, 20 F.3d at 628. The considerable costs, hard work, and expenditures of resources and time, attributed to UCS in developing the claimed secret are factors that establish the existence of a trade secret. *See Metallurgical Indus.*, 790 F.2d at 1201.

9. Trade secret protection exists for the overall design, structure and architecture of UCS's computer programs. Texas law recognizes that software and computer know-how constitute protectable trade secrets. *BPI Systems, Inc. v. Leith*, 532 F.Supp. 208, 211 (W.D. Tex. 1981) (accounts receivable program); *Schalk v.*

Texas, 823 S.W.2d 633, 636 (Tex. Crim. App. 1991) ("Having determined that computer programs are proper subjects for trade secret litigation under Texas civil and criminal law . . . "); *Gonzales v. Zamora*, 791 S.W.2d 258 (Tex. App. – Corpus Christi 1990, no writ) (computer system and procedures for hospital administration of accounts payable).

10. Under Texas law Defendants have committed a misappropriation of "confidential" business information. *See T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W. 2d 18, 21-22 (Tex. App. – Houston [1st Dist.] 1998, no pet.). The Defendants who gained access to information from a confidential relationship with UCS incurred a duty not to use it to UCS's detriment. *See Phillips v. Frey*, 20 F.3d 623, 632 (5th Cir. 1994). Defendants accessed UCS's trade secrets through improper means and a breach of a confidential relationship. *See Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S. W.2d 763, 769 (Tex.), *cert. denied.* 102 S. Ct. 3488 (1958), *citing to* Restatement of Torts § 757. The conduct of all Defendants in accessing, utilizing, exploting [sic], and incorporating UCS's trade secrets into the CarMan project constituted improper means. *See Phillips v. Frey*, 20 F.3d 623, 629 (5th Cir. 1994).

11. UCS has established that Defendants' exploited UCS's trade secrets as evidenced by the fact that the features of the trade secret have been incorporated into the Defendant's product. *See Metallurgical Indus.*, 790 F.2d at 1205. The fact that Defendants had no prior knowledge of dealer management systems and were able to develop CarMan in such a short time is evidence of misappropriation. *See Phillips v. Frey*, 20 F.3d at 628.

12. The fact that a trade secret is of such a nature that it can be discovered by experimentation or other fair

and lawful means does not deprive its owner of the right to protection from those who would secure possession of it by unfair means. *K&G Oil Tools & Serv. Co. v. G & C Fishing Tool Serv.*, 314 S.W.2d 782 (Tex. 1958).

12. Defendants did not start with a "blank sheet" in creating its dealer management system. Instead, Defendants created a competitive and functionally equivalent software application through the direct exploitation of UCS's trade secrets.

13. It has been established by a preponderance of the evidence that (1) a binding contract between UCS and SMT existed, and (2) SMT breached the contract. SMT thereafter engaged in a material breach of its contractual obligations by using, and allowing the other Defendants to use, UCS's confidential and proprietary information to create a competing dealer management system. UCS suffered damages caused by this breach. *See Hussong v. Schwan's Sales Enter., Inc.*, 896 S.W.2d 320, 326 (Tex. App. – Houston [1st Dist.] 1995, no writ).

14. Certain implied duties, apart from any written contract, arise upon the formation of an employment relationship. *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 21-22 (Tex. App. – Houston [1st Dist.] 1998, no pet.). "One of those duties forbids an employee from using confidential or proprietary information acquired during the relationship in a manner adverse to the employer. This obligation survives termination of employment. Although this duty does not bar use of general knowledge, skill, and experience, it prevents the former employee's use of confidential information or trade secrets acquired during the course of employment." *Id.* At 22 (citations omitted). There is no requirement that an express contract exist between the employer and employee

regarding confidentiality. *Id.* These duties implied by law are of a fiduciary nature and arise out of the law of principal and agent. *See generally Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 ITex. 1942).

15. Former UCS employees hired by Defendants owed UCS an implied and explicit contractual obligation to safeguard and not exploit UCS's trade secrets. Since the facts establish that former UCS employees gave the Defendants confidential and proprietary information regarding the UCS dealer management system, Defendants are liable for interfering with the duty of loyalty owed by former employers of UCS. Thus, all Defendants are liable as joint tortfeasors for the breaches of loyalty and fiduciary duties by the former UCS employees, because the Defendant's knowingly participated in the breach of duty of a fiduciary. *See Kinzbach Tool Co.*, 160 S.W.2d at 514. Also by retaining former UCS employees for the purpose of exploiting their intimate knowledge of UCS's trade secrets, Defendants are liable for the breaches committed by those employees.

16. The doctrine of misappropriation is a branch of the tort of unfair competition which involves the appropriation and use by the defendant, in competition with the plaintiff, of a unique pecuniary interest created by the plaintiff through the expenditure of labor, skill, and money. It is recognized under Texas law. *U.S. Sporting Prod., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214, 217 (Tex. App. – Waco 1993, writ denied) (quoting *Universal City Studios v. Kamar Industries*, 217 U.S.P.Q. 1162 (S.D.Tex. 1982)). Defendants have committed misappropriation through unfair competition. *Id.* at 218. It has been established that (i) UCS expended enormous amounts of time, money, and resources in developing the structure, architecture, and design for its dealer management

system, and (ii) Defendants have taken this product of UCS and have used it in competition with UCS and intend to do so in the future, and (iii) UCS has suffered commercial injury.

17. The Defendants engaged in a civil conspiracy and the essential elements of civil conspiracy have been proven: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

18. To establish a civil conspiracy UCS need not prove a formal agreement to commit conspiracy; the understanding may be a tacit one and it is not essential that each conspirator have knowledge of the details of the conspiracy. *See Kirby v. Cruce*, 688 S.W.2d 161, 164 (Tex. App. – Dallas 1985, writ ref'd n.r.e.), *quoting Bourland v. State*, 528 S.W.2d 350, 354 (Tex. Civ. App. – Austin 1975, writ ref'd n.r.e.). Under Texas law, the existence of a conspiracy need not be shown by direct evidence and is ordinarily established by circumstantial evidence. *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 582 (Tex. 1963). Upon entering the conspiracy one becomes a party to all acts previously or subsequently done by any of the other conspirators in pursuance of the conspiracy. *Bourland*, 528 S.W.2d at 354 (citations omitted; emphasis supplied). If a party participates in a civil conspiracy, it is joint and severally liable for all damages caused by the conspiracy. *Hart v. Moore*, 952 S.W.2d 90, 98 (Tex. App. – Amarillo 1997, writ denied); *Kirby*, 688 S.W.2d at 164.

19. All Defendants engaged in a civil conspiracy to misappropriate UCS's trade secrets and engage in all other wrongful conduct as alleged in UCS's other causes of action. Therefore, all Defendants conspired

together and all are jointly and severally liable for all acts undertaken by any participant in the conspiracy.

20. UCS did not waive or publicly disclose any material aspect of its dealer management system or the structure, architecture, and design thereof. The preponderance of the evidence establishes that UCS did not publicly disclose the functionality of its system. Defendants' affirmative defense that UCS waived the proprietary status of its trade secrets and confidential information is without merit. Texas recognizes no bright-line standard regarding public disclosure. Under Texas law, secrecy is a relative term. *See Taco Cabana Int'l v. Two Pesos, Inc.*, 932 F.2d 1113, 1125 (5th Cir. 1991). In this regard, "[a]lthough the law requires secrecy, it need not be absolute." *Metallurgical Indus., Inc., v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986). Under Texas law, non-disclosure agreements are not required to preserve a trade secret. *Phillips v. Frey*, 20 F.3d 623, 631 (5th Cir. 1994). *Gonzalez v. Zamora*, 791 S.W.2d 258, 265 (Tex. App. – Corpus Christi 1990, no writ); *Metallurgical Indus. v. Fourtek, Inc.*, 790 F.2d 1195, 1200-1201 (5th Cir. 1986). Under Texas law disclosures in furtherance of one's economic interests do not constitute a waiver of trade secret protection. *Taco Cabana*, 932 F.2d at 1124; *Metallurgical Indus.*, 790 F.2d at 1200; *Phillips*, 20 F.3d at 630-32. Under Texas law an owner of a trade secret will not lose trade secret protections by disclosure even if he creates a non-disclosure duty and places that duty upon another. *Phillips*, 20 F.3d at 630. Under Texas law the injured party is not required to rely on an express agreement to hold the trade secrets in confidence. *Id.* No particular form of notice is needed; the question raised is whether the recipient of the information knew or should have known that the information was a trade secret and the disclosure was made in confidence. *Id.* at 632. All

parties receiving a limited marketing presentation by UCS knew that such information was confidential and could not be exploited.

21. It is not necessary to prove substantial secrecy when the misappropriation occurs through a breach of a confidential relationship. *See Chandler v. Mastercraft Dental Corp.*, 739 S.W.2d 460, 469 Tex. App. – Fort Worth 1987, writ denied). *See also Phillips*, 20 F.3d at 628 (citing to *Chandler* approvingly). Under Texas law, unprotected disclosures will not constitute a waiver if they do not provide the third-party with the opportunity to replicate the trade secret. *See Schalk v. State of Texas*, 823 S.W.2d 633 (Tex. Crim. App. 1991). *See also Gonzales v. Zamora*, 791 S.W.2d 258, 265 (Tex. App. – Corpus Christi 1990, no writ). Defendants have not demonstrated that UCS's alleged disclosure was of such a magnitude that a third-party could learn, retain, or otherwise reproduce UCS's trade secrets. Defendants have not proved that UCS waived any trade secret protection. Any disclosures were limited and made within the parameters authorized by the law. If certain disclosures were somehow outside of this area of protection, it is established that no one could use them to exploit and misappropriate UCS's secrets due to their limited nature.

22. The statute of limitations regarding trade secrets misappropriation is three years and has a mandatory discovery rule provision. TEX CIV. PRAC. & REM. CODE § 16.010(A). UCS timely filed its claim within three years after it discovered the misappropriation. It has been established that Defendants actively concealed the misappropriation and that UCS cannot be expected to have discovered the misappropriation at an earlier date. However, I agree with the majority that the causes of action which have a two year statute of limitations are barred, as these causes of action accrued no later than January or February 1997.

23. The preponderance of the evidence established that UCS never duplicated or copied, or attempted to duplicate or copy, ADP's software features. Therefore ADP's counterclaim is meritless and should be dismissed without prejudice.

24. I agree with the majority that UCS has not registered any copyright for its system. In that same vein, UCS's causes of action are not preempted by the United States Copyright Act. UCS's state law claims are not identical to a copyright claim nor are they equivalent to any of the exclusive rights of a federal copyright, because one or more qualitatively different elements are required to constitute the state-based cause of action. *See Raymond T. Nimmor*, THE LAW OF COMPUTER TECHNOLOGY, § 3:60 (West 2002). *See also, Computer Management Assistance Co. v. De Castro*, 220 F.3d 396, 404 (5th Cir. 2000). The majority of this arbitration panel misinterprets the law by concluding that The Copyright Act preempts the state law claims in this case. Their reliance on **Butler I**, **Butler II** and **Butler III** is misdirected and incorrect. Furthermore on April 24, 2003, Defendants filed a Motion to Dismiss or, Alternatively, Motion for Summary judgment and made specific admissions that UCS's claims were not subject to copyright protection. *See ADP and DSI's Motion*, ¶ 10. In light of this admission that UCS's trade secrets are not subject to copyright protection, Defendants cannot pursue a copyright defense.

Damages

25. UCS is entitled to the remedies of restitution and damages. I agree with the majority that UCS is not entitled to injunctive relief because UCS testified through its officers that CarMan contained UCS trade

secrets and non-trade secrets. UCS failed to specifically identify that which was not a trade secret.

26. However, UCS is entitled to recover unjust enrichment and restitution damages for misappropriation of trade secrets. Unjust enrichment, restitution, and reasonable royalty all relate to the same basic concept of remedial law which seeks to prevent a defendant from wrongfully gaining at the expense of a plaintiff and to return that gain to the plaintiff. It is further found that such a remedial scheme is applicable as a remedy for all causes of action proved by UCS in this proceeding. Under Texas law a "reasonable royalty" should be imposed upon the Defendants for misappropriating UCS's trade secrets. *See University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974); *See also, Taco Cabana, Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1128 (5th Cir. 1991); *See also, Metallurgical Indus., Inc. v. Fourtek Inc.*, 790 F.2d 1195, 1208 (5th Cir. 1986).

27. Case law has made clear that restitutionary remedies are to be flexible and tailored to the specific facts of the case. *Lykes-Youngstown* 504 F.2d at 536, 538. The remedy of restitution allows UCS to recover as damages "the benefits, profits, or advantages gained by the Defendant in use of the trade secret." 504 F.2d at 536. Restitution allows recovery of actual benefits obtained by the Defendant as well as potential benefits, even if such benefits were not in fact realized. 504 F.2d at 536. The burden is then upon the Defendant to prove that profits were caused by factors other than the misappropriated trade secret. *Id.* In order to recover restitution, UCS need not prove that the defendants did in fact profit from the misappropriation. *Id.* There is no requirement that the royalty be derived as a "percentage of actual profits." *Id.* Instead, the measure is the actual value of what has been appropriated." *Id.* Potential benefits are a form

of reasonable royalty. There is no requirement that the Defendants actually profit from the misappropriation for UCS to recover restitution damages. *Id.* at 536. There is no requirement of certainty for the measure of damages when assessing the royalty. *Id.* at 537, 539.

29. The fact that UCS's trade secrets may have been modified or combined with additional features does not defeat recovery. *Lykes-Youngtown Corp.*, 504 F.2d at 536-37. A reasonable royalty can be imposed upon defendants who have benefited from the misappropriation in non-obvious or "subtle" manners. 504 F.2d at 540. Exercising "control and dominion" over the stolen trade secrets is the dispositive criterium for determining liability for restitution damages. *Id.* at 541-42.

29. Both SMT and BSI exercised "control and dominion" over the trade secrets. As such, SMT and BSI have either directly benefited from the misappropriation of UCS's trade secrets, or benefited in a non-obvious, subtle manner from the misappropriation of UCS's trade secrets.

30. Defendants are liable jointly and severally for damages in the amount of $24,610,000.00. UCS is entitled to recover from ADP, BSI and SMT, jointly and severally, $24,610,000.00 in actual damages. *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974)

Respectfully submitted,

/s/ Susan S. Soussan
Hon. Susan S. Soussan

Opinion issued September 12, 2002

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-02-00219-CV

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC., Appellants,

V.

DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., ADP, INC., BUSINESS SOLUTIONS, INC., SMC INVESTMENT, INC., SOUTHWEST TOYOTA, INC., AND SMC LUXURY CARS, INC., Appellees.

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 99-11466

OPINION

This is an accelerated appeal from an order signed on March 4, 2002. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a) (Vernon Supp. 2002); TEX. R. APP. P. 28.1. Appellants timely filed their notice of appeal on March 5, 2002.

On April 11, 2002, appellees Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc., and ADP, Inc. filed "Appellees' Motion to Dismiss" for lack of jurisdiction. On April 23, 2002, appellees SMC Investment, Inc., Southwest Toyota, Inc., and SMC Luxury Cars, Inc. filed "Sterling McCall Appellees' Motion to Dismiss" for lack of jurisdiction. The motions to dismiss are **granted** as follows.

Interlocutory orders, such as the one in question here, may only be appealed if permitted by statute. *See Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272 (Tex. 1992); *Smith Barney Shearson, Inc. v. Finstad,* 888 S.W.2d 111, 113 (Tex. App. – Houston [1st Dist.] 1994, no writ). Section 171.098(a) of the Texas Civil Practice and Remedies Code provides that a party may appeal a judgment or decree entered under this chapter or an order (1) denying an application to compel arbitration made under section 171.021, (2) granting an application to stay arbitration made under section 171.023, (3) confirming or denying confirmation of an award, (4) modifying or correcting an award, or (5) vacating an award without directing a rehearing.

The trial court's March 4, 2002 order being appealed does not fall into any of these categories. The order appealed from, in pertinent part, reads as follows:

> Plaintiffs' [appellants'] Motion to Compel Arbitration is granted in part and denied in part. All parties and all claims alleged in this case shall be referred to arbitration for the resolution of such claims. However, the Court's order referring this matter to arbitration will be entered by the Court only after (1) Defendants [appellees] have an opportunity to seek clarification of the December 10, 2001 Order denying Defendants'

> Second Motion to dismiss for Discovery Abuse from the Special Master and the January 8, 2002 order denying SMT's Motion to Compel Discovery, and (2) all parties have had an opportunity to object to the Special Master's order and obtain a ruling on such objections by the Court.

The trial court's order is closely analogous to the order under consideration in *In re MHI Partnership, Ltd.*, 7 S.W.3d 918, 920-21 (Tex. App. – Houston [1st Dist. 1999, orig. proceeding). There, the Court held that an order deferring a ruling on a motion to compel arbitration until discovery was completed fit none of the categories of section 171.098(a), and therefore no interlocutory appeal would lie.

Appellants argue that the trial court's order is a denial of its motion to compel and thus appealable under section 171.098(a)(1) because it contains the words "denied in part." We disagree this constitutes a denial within the meaning of section 171.098(a)(1). Upon reading the trial court's order as a whole, it is readily apparent the court was not denying the motion to compel arbitration, but merely delaying the granting of it until certain conditions had occurred. *See In re MHI Partnership, Ltd.*, 7 S.W.3d at 920-21.

Appellants further argue the trial court's order was a grant of a stay of arbitration and thus appealable under section 171.098(a)(2). We disagree. The record shows no party had applied to stay arbitration proceedings under section 171.023. Section 171.023 authorizes a trial court to stay an arbitration commenced or threatened on application and a showing that there is not an agreement to arbitrate. Here, no party showed or even argued there is not an agreement to arbitrate. Moreover, there was as yet

no arbitration commenced or threatened which could be stayed, and a review of the language of the trial court's order does not reveal any intent by the trial court to stay or enjoin any party from participating in arbitration.

Appellants further argue the trial court's order was a grant of a temporary injunction and thus appealable under section 51.014(a)(4) of the Texas Civil Practice and Remedies Code because it was a stay of arbitration. We disagree for the same reasons we do not agree the trial court's order was a grant of a stay.

This appeal is **dismissed** for want of jurisdiction. All pending motions not granted herein are denied.

PER CURIAM

Panel consists of Justices Taft, Radack, and Price.[1]

Do not publish. TEX. R. APP. P. 47.

[1] The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

REC'D SEP 13 2002

[SEAL]

Court of Appeals

First District of Texas

JUDGMENT

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES. INC., Appellants	Appeal from the 133rd District Court of Harris County, Texas. (Tr. Ct. No. 99-11466.) Panel consists of Justices Taft, Radack, and Price. Opinion delivered by Justice Price.
NO. 01-02-00219-CV V.	
DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., ADP, INC., BUSINESS SOLUTIONS, INC., SMC INVESTMENT, INC., SOUTHWEST TOYOTA, INC., AND SMC LUXURY CARS, INC., Appellees	

On this day came on to be considered the above-entitled cause, and the same having been duly considered, it is therefore **CONSIDERED, ADJUDGED,** and **ORDERED** that the appeal herein be, and the same hereby is, **dismissed for want of jurisdiction.**

It is further **ORDERED** that the appellants, UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER

SERVICES, INC., jointly and severally, pay the costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance. Judgment rendered by panel consisting of Justices Taft, Radack, and Price. Judgment rendered September 12, 2002.

REC'D SEP 11 2002

Order issued September 5, 2002

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-02-00219-CV

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC., Appellants

V.

DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., ADP, INC., BUSINESS SOLUTIONS, INC., SMC INVESTMENT, INC., SOUTHWEST TOYOTA, INC., AND SMC LUXURY CARS, INC., Appellees

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On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 99-11466

ORDER

This is an accelerated appeal from an order signed on March 4, 2002. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a) (Vernon Supp. 2002); TEX. R. APP. P. 28.1. Appellants timely filed their notice of appeal on March 5, 2002.

On April 11, 2002, appellees Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc., and ADP, Inc. filed "Appellees' Motion to Dismiss" for lack of jurisdiction. On April 15, 2002, this Court ordered appellants to file a brief demonstrating that the Court has jurisdiction of this appeal within 15 days.

On April 19, 2002, appellants filed "Motion to Expedite and Response to Motion to Dismiss." The Court's records indicate appellants have not paid the $10 motion fee. On April 23, 2002, appellees SMC Investment, Inc., Southwest Toyota, Inc., and SMC Luxury Cars, Inc. filed "Sterling McCall Appellees' Motion to Dismiss" for lack of jurisdiction, to which appellants filed a response on May 3, 2002.

On May 7, 2002, appellants filed an "Unopposed Motion for Extension of Time to Respond to the Court's Request for Briefing on the Jurisdictional Issue on the Ground of Failure of Notice" as ordered by this Court on April 15, 2002; and the clerk of this Court received appellants' "Response to the Court's Request for Briefing on the Jurisdictional Issue." The Court's records indicate appellants have not paid the $10 motion fee.

On May 10, 2002, the parties filed a "Joint Motion to Extend Time" to file appellees' briefs in response to appellants' "Response to the Court's Request for Briefing on the Jurisdictional Issue" and any reply of appellants to appellees' briefs in response. On May 15, 2002, the clerk of this Court received appellees Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc., and ADP, Inc.'s "Appellees' Response to Appellants' Jurisdictional Brief." On May 21, 2002, the clerk of this Court received appellees SMC Investment, Inc., Southwest Toyota, Inc., and

SMC Luxury Cars, Inc.'s "Sterling McCall Appellees' Brief and Response to Appellant's [sic] Jurisdictional Brief." On June 3, 2002, the clerk of this Court received appellants' "Reply Brief of Appellants."

Rulings of the Court

1. Appellants' April 19, 2002 motion to expedite is **denied,** and appellants are **ordered** to pay their $10 fee for filing this motion within 10 days of the date of this order.

2. Appellants' May 7, 2002 unopposed motion for extension of time is conditionally **granted**, provided:

   a. appellants pay their $10 fee for filing this motion within 10 days of the date of this order.

   b. Assuming appellants will comply with this order, the clerk of this Court is **ordered** to file appellants' "Response to the Court's Request for Briefing on the Jurisdictional Issue," which was received on May 7, 2002, upon receipt of appellants' $10 motion fee.

3. The parties' May 10, 2002 joint motion to extend time is **granted**, and the clerk of this Court is **ordered** to file:

   a. Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc., and ADP, Inc.'s "Appellees' Response to Appellants' Jurisdictional Brief" which was received on May 15, 2002;

   b. SMC Investment, Inc., Southwest Toyota, Inc., and SMC Luxury Cars, Inc.'s "Sterling McCall Appellees' Brief and Response to Appellant's [sic] Jurisdictional Brief" which was received on May 21, 2002; and

c. appellants' "Reply Brief of Appellants" which was received on June 3, 2002.

4. Appellees Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc., and ADP, Inc.'s April 11, 2002 motion to dismiss and appellees SMC Investment, Inc., Southwest Toyota, Inc., and SMC Luxury Cars, Inc.'s April 23, 2002 motion to dismiss remain pending before this Court.

It is so **ORDERED**.

PER CURIAM

Do not publish. TEX. R. APP. P. 47.

Order issued April 15, 2002

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-02-00219-CV

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC., Appellants

V.

DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., ADP, INC., BUSINESS SOLUTIONS, INC., SMC INVESTMENT, INC., SOUTHWEST TOYOTA, INC., AND SMC LUXURY CARS, INC., Appellees

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On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 99-11466

ORDER

This is an accelerated appeal from an order signed on March 4, 2002. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a) (Vernon Supp. 2002); TEX. R. APP. P. 28.1. In pertinent part, the order appealed from, reads as follows:

> Plaintiffs' [appellants'] Motion to Compel Arbitration is granted in part and denied in part. All

> parties and all claims alleged in this case shall be referred to arbitration for the resolution of such claims. However, the Court's order referring this matter to arbitration will be entered by the Court only after (1) Defendants [appellees] have an opportunity to seek clarification of the December 10, 2001 Order denying Defendants' Second Motion to dismiss for Discovery Abuse from the Special Master and the January 8, 2002 order denying SMT's Motion to Compel Discovery, and (2) all parties have had an opportunity to object to the Special Master's order and obtain a ruling on such objections by the Court.

Appellants timely filed their notice of appeal on March 5, 2002. As stated in their brief, appellants' complaint is not that the trial court granted or denied their motion to compel arbitration, but that the trial court is delaying the compelling of arbitration, which the parties agreed to during the course of this litigation.

Rulings of the Court

(1) The Court has considered appellants' motion for emergency stay and appellees' response thereto. The motion is **denied.**

(2) Interlocutory orders, such as the one in question here, may only be appealed if permitted by statute. *See Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272 (Tex. 1992); *Smith Barney Shearson, Inc. v. Finstad,* 888 S.W.2d 111, 113 (Tex. App. – Houston [1st Dist.] 1994, no writ). Section 171.098(a) provides that a party may appeal a judgment or decree entered under this chapter or an order (i) denying an application to compel arbitration made under section 171.021, (ii) granting an application to stay arbitration made under

section 171.023, (iii) confirming or denying confirmation of an award, (iv) modifying or correcting an award, or (v) vacating an award without directing a rehearing. The March 4, 2002 order does not fall into any of these categories. There is clearly going to be arbitration in this case once certain preconditions have been met. Accordingly, unless within 15 days of the date of this order, appellants file a brief demonstrating that the Court has jurisdiction of this appeal, the appeal will be dismissed for want of jurisdiction.

(3) Appellees' brief will be due 30 days after the date of this order, and such brief may respond to the jurisdictional argument of appellants.

It is so **ORDERED**.

PER CURIAM

Do not publish. TEX. R. APP. P. 47.

Opinion issued April 8, 2002

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-02-00343-CV

IN RE UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC., Relators

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Original Proceeding on Petition for Writ of Mandamus

OPINION

On April 3, 2002, relators and plaintiffs below, Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc., and Dealer Computer Services, Inc., filed a petition for writ of mandamus complaining that Judge McCorkle[1] signed an order denying in part their motion to compel arbitration.

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[1] The Honorable Lamar McCorkle, judge of the 133rd District Court of Harris County, Texas. The underlying lawsuit is *Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc., and Dealer Computer Services, Inc. v. Dealer Solutions, L.L.C. and Dealer Solutions Holdings, Inc.*, trial court cause no. 99-11466.

The March 4, 2002 order in question read, in pertinent part as follows:

> Plaintiffs' Motion to Compel Arbitration is granted in part and denied in part. All parties and all claims alleged in this case shall be referred to arbitration for the resolution of such claims. However, the Court's order referring this matter to arbitration will be entered by the Court only after (1) Defendants have an opportunity to seek clarification of the December 10, 2001 Order denying Defendants' Second Motion to dismiss for Discovery Abuse from the Special Master and the January 8, 2002 Order denying SMT's Motion to Compel Discovery, and (2) all parties have had an opportunity to object to the Special Master's order and obtain a ruling on such objections by the Court.

We decline to hold that Judge McCorkle abused his discretion in the following circumstances presented by this mandamus proceeding:

(1) The lawsuit was filed on March 4, 1999.

(2) On December 2, 1999, the trial court signed an agreed order appointed a special master to review and make recommendations concerning discovery disputes.

(3) The first motion concerning arbitration appears to have been filed on February 11, 2000, when certain defendants below filed a motion to stay litigation pending arbitration.

(4) On October 2, 2000, the trial court signed an order, agreed to by all parties to the litigation, to stay action and compel arbitration.

(5) On November 6, 2000, the trial court withdrew and set aside the October 2, 2000 agreed order to arbitrate. The November 6 order also stated: "It is further ordered that the agreed order to arbitrate will be enforced at a future date." It does not appear that any review was sought of the November 6, 2000 order in the appellate court.

(6) Thereafter, there appears to have been a series of motions to compel discovery and to dismiss for discovery abuse. There also appears to have been a stay placed on discovery by relators. That stay was lifted in an order signed on December 10, 2001. It does not appear that any review was sought of the rulings on the motions to compel discovery or to dismiss for discovery abuse in the appellate court.

(7) About December 12, 2001, relators filed a motion to compel arbitration, stating that, "the time has come to enforce the agreed order to stay action and compel arbitration agreed to and signed by the parties." At least one group of defendants objected, stating that they wanted to seek clarification of and object to certain other rulings in the December 10, 2001 order. Judge McCorkle's ruling on these matters was the March 4, 2002 order in question.

Relators base their petition for writ of mandamus in part on this Court's holding in *In re MHI P'ship,* 7 S.W.3d 918 (Tex. App. – Houston [1st Dist.] 1999, orig. proceeding). We find the circumstances in *MHI P'ship* distinguishable from those here.

The motion for emergency stay and the petition for writ of mandamus are denied.

PER CURIAM

Panel consists of Chief Justice Schneider and Justices Taft and Radack.

Do not publish. TEX. R. APP. P. 47.

CAUSE NO. 99-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
V.	§	OF HARRIS COUNTY, TEXAS
DEALER SOLUTIONS, L.L.C. AND DEALER SOLUTIONS HOLDINGS, INC., ET AL	§	133RD JUDICIAL DISTRICT

ORDER

Clarification of December 10, 2001 Order Denying Defendant's Second Motion to Dismiss for Discovery Abuse and January 8, 2002 Order Denying Motion to Compel Discovery

(Filed May 21, 2002)

Came onto be heard Defendant's Motion for Clarification of the Court's Order of December 10, 2001 denying Defendant's Second Motion to Dismiss for Discovery Abuse and the Court's January 8, 2002 Order Denying Defendant's Motion to Compel Discovery. The Court has reviewed the evidence and the authorities and has considered arguments of counsel. Therefore, the Court, hopefully, clarifies its prior Orders by revising same as follows:

December 10, 2001 Order denying Defendant's Second Motion to Dismiss for Discovery Abuse is amended to read:

"ORDERED, ADJUDGED and DECREED that:

1) UCS's Motion to Lift Discovery Stay is GRANTED;

2) Defendant DSI's Second Motion to Dismiss for Discovery Abuse is DENIED;

3) Defendant Sterling McCall's Second Motion to Dismiss for Discovery Abuse is DENIED;

4) Defendant BSI's Motion to Dismiss for Discovery Abuse is DENIED;

5) The presumption that the claimed trade secret of Plaintiffs does not exist set forth in the Court's Order of January 25, 2001, is withdrawn;

6) Plaintiffs have stipulated that the only trade secret being claimed by Plaintiffs in their action is the overall structure, architecture and design of their computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter.

   Plaintiffs' evidence identifying and describing their claimed trade secret shalt be limited to their interrogatory responses served on February 21, 2001, which Plaintiffs have stipulated are a complete description of their claimed trade secret.

7) Except as set forth herein above, all prior orders and findings of the Court remain in effect."

January 8, 2002 Order denying Defendant's Motion to Compel Discovery is amended to read:

"The Court has reviewed the evidence and the authorities and has considered arguments of counsel, including the stipulation by Plaintiff that any claim for lost

profits has been dropped. Further, the Court finds that Plaintiff is not compelled to seek damages which require the utilization of Plaintiffs' financial records as evidence nor does case law mandate the use of Plaintiffs' financial records in proving reasonable royalty in a trade secret dispute. It is therefore ORDERED, ADJUDGED and DECREED that Sterling McCall Defendants' Motion to Compel regarding UCS' financial information is denied."

SIGNED this 9 day of May, 2002.

/s/ Lamar McCorkle
JUDGE PRESIDING

CAUSE NO. 99-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
	§	OF HARRIS COUNTY, TEXAS
V.	§	
DEALER SOLUTIONS, L.L.C. AND DEALER SOLUTIONS HOLDINGS, INC.	§	133RD JUDICIAL DISTRICT

ORDER

(Filed Dec. 6, 2001)

Came on to be heard Plaintiffs Universal Computer Systems, Inc.'s, Universal Computer Consulting, Ltd.'s, Universal Computer Services, Inc.'s and Dealer Computer Services, Inc.'s (collectively "UCS") Motion to Lift Discovery Stay; Defendants Dealer Solutions, L.L.C.'s, Dealer Solutions Holdings, Inc.'s and ADP, Inc.'s (collectively "DSI") Second Motion to Dismiss for Discovery Abuse; Defendants SMC Investment, Inc. f/k/a SWT Investments, Inc.'s, Southwest Toyota Inc. d/b/a Sterling McCall Toyota's and SMC Luxury Cars, Inc. d/b/a Sterling McCall Lexus' (collectively "Sterling McCall") Second Motion to Dismiss for Discovery Abuse; and Defendant Business Solutions, Inc.'s ("BSI") Motion to Dismiss for Discovery Abuse.

The Court finds that the Plaintiffs have stipulated that the Supplemental Answers to Interrogatories filed in response to this Court's June 15, 2000 and August 8, 2000 Orders are complete, no further responsive information is

available to Plaintiffs and Plaintiffs have complied with prior Court Orders to the best of their ability.

The Court has reviewed the evidence and the authorities and has considered arguments of counsel. It is therefore

ORDERED, ADJUDGED and DECREED that:

1) UCS's Motion to Lift Discovery Stay is GRANTED;

2) Defendant DSI's Second Motion to Dismiss for Discovery Abuse is DENIED;

3) Defendant Sterling McCall's Second Motion to Dismiss for Discovery Abuse is DENIED;

4) Defendant BSI's Motion to Dismiss for Discovery Abuse is DENIED;

5) The presumption that the claimed trade secret of Plaintiffs does not exist set forth in the Court's Order of January 25, 2001, is withdrawn;

6) Except as set forth in 5) above, all prior orders and findings of the Court remain in effect;

7) Plaintiff's evidence in support of its claim that its automobile dealership management software system is a trade secret shall be limited to its proof set forth in its responses and supplemental responses to interrogatories submitted to Defendants prior to September 1, 2001.

SIGNED this 10 day of December, 2001.

/s/ Lamar McCorkle
JUDGE PRESIDING

NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, et al	§	**IN THE DISTRICT COURT OF**
VS.	§	**OF HARRIS COUNTY, TEXAS**
DEALER SOLUTIONS, L.L.C., et al	§	**133RD JUDICIAL DISTRICT**

ORDER

(Filed Jan. 19, 2001)

The Court has considered Defendant Dealer Solutions, L.L.C.'s, Dealer Solutions Holdings, Inc.'s and ADP, Inc.'s Motion to Dismiss for Discovery Abuse pursuant to Rule 215 of the Texas Rules of Civil Procedure, joined in by Defendant SMC Investment, Inc., Southwest Toyota, Inc., SMC Luxury Cars and Business Solutions, Inc., and the pleadings evidence, and arguments presented by counsel, and determines that the motion should be granted in part and denied in part and,

I.

The Court finds:

1.) that in response to this Court's Orders of April 12, 2000, June 15, 2000 and August 8, 2000, Plaintiffs have filed supplemental answers to interrogatories nos. 1, 3, 5, 6 and 7 as a joint and consolidated answer to such interrogatories;

2.) that despite such Orders these supplemental interrogatory answers have failed to adequately answer the interrogatories by identifying the trade secret or trade secrets claimed by Plaintiffs

in the specific manner directed in paragraphs 1 through 4 of the June 15, 2000 Order and, contrary to such Order, Plaintiffs have not sought to answer the interrogatories without descriptive reference to external documents;

3.) that while such continual failure justifies the imposition of sanctions, it does not yet justify the death penalty sanctions sought by Defendants. Plaintiffs have not refused to supplement such answers and have continued such supplementation, and Plaintiffs should be given a final opportunity to answer the interrogatories in the specific manner directed by this Court's Orders and without any descriptive reference to external documents as such answer, and

4.) that because of such failure by Plaintiffs the stay of discovery by Plaintiffs shall be continued, and there shall be taken as established a presumption of the non-existence of any trade secret or trade secrets claimed by Plaintiffs, subject to the Plaintiffs being required during the next 30 days to adequately answer such interrogatories as directed and to rebut the presumptions of the non-existence of trade secrets by such answer in order to avoid the presumption becoming irrebuttable and to avoid dismissal upon any motion for summary judgment by Defendants.

5.) that Plaintiffs have stipulated that the only trade secret being claimed by Plaintiffs in their action is the overall structure, architecture and design of its computer system as a whole and not any individual process, formula, pattern, device or compilation of information or other matter.

II.

IT IS THEREFORE ORDERED that because of Plaintiffs failure to adequately answer the interrogatories, Defendants' Motion is GRANTED in part and the stay of any discovery by Plaintiffs is continued until such time as Plaintiffs have specifically answered Defendants interrogatories concerning trade secrets as directed in this Court's Order of June 15, 2000, and there is taken as established a presumption that the claimed trade secret of Plaintiffs does not exist, subject to the Plaintiff during the next 30 days answering the interrogatories as directed and to rebutting the presumption of the non-existence of trade secrets in order to avoid the presumption becoming irrebuttable and to avoid dismissal of Plaintiff's action. It is also ORDERED that the Defendants' Motion is DENIED in part in that dismissal of Plaintiff's action shall not be ordered at this time. If Plaintiffs fail within 30 days to adequately answer the interrogatories and rebut the presumption, the presumption shall become irrebuttable.

SIGNED this 25 day of January 2001.

/s/ Lamar McCorkle
JUDGE PRESIDING

NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., STERLING MCCALL TOYOTA, STERLING MCCALL LEXUS, BUSINESS SOLUTIONS, INC., and ADP, INC.	§	133RD JUDICIAL DISTRICT

ORDER SETTING ASIDE AGREED ORDER TO STAY ACTION AND COMPEL ARBITRATION

(Filed Nov. 6, 2000)

The October 2, 2000 Agreed Order to Stay Action and Compel Arbitration is hereby withdrawn and set aside by the Court.

It is further Ordered that the Agreed Order to Arbitrate will be enforced at a future date.

SIGNED this 6 day of ~~October~~ November, 2000.

/s/ Lamar McCorkle
JUDGE PRESIDING

NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
DEALER SOLUTIONS, L.L.C., ET AL.	§	133RD JUDICIAL DISTRICT

AGREED ORDER TO STAY ACTION AND COMPEL ARBITRATION

(Filed Oct. 2, 2000)

The parties' agreed motion to stay this action and compel arbitration is granted. The Court ORDERS as follows:

1. Universal Computer Systems, Inc., Universal Computer Consulting, Ltd., Universal Computer Services, Inc. and Dealer Computer Services, Inc., Plaintiffs, and Dealer Solutions, L.L.C., Dealer Solutions Holdings, Inc., ADP, Inc., SMC Investment, Inc., f/k/a SWT Investments, Inc., Southwest Toyota, Inc., d/b/a Sterling McCall Toyota, SMC Luxury Cars, Inc., d/b/a Sterling McCall Lexus, and Business Solutions, Inc., Defendants, shall submit to arbitration the entire controversy between them as set forth in the Plaintiffs' pleadings herein and the Defendants' answers thereto and any related claim or counterclaim that could be asserted by Plaintiffs against Defendants or by Defendants against Plaintiffs.

2. All of the claims shall be heard and finally determined by a three-arbitrator panel. One of the arbitrators shall be Alvin L. Zimmerman. Plaintiffs have designated former Judge Susan Soussan as the second arbitrator. Defendants shall designate a third arbitrator on or before August 21, 2000. Following the designation of such arbitrators, no party shall have any ex parte communication, with any arbitrator related to the subject of the arbitration proceeding.

3. The parties shall commence arbitration upon agreement of the arbitrators. All of the issues raised by the pleadings filed herein or that may be filed in the arbitration proceeding, shall be heard and finally determined by the arbitrators in a written final award issued within 30 days of the conclusion of the arbitration hearing. Such final award shall be filed no later than December 29, 2000.

4. The deadlines in the Court's Second Amended Scheduling Order are set aside, and a new scheduling order will be imposed by the arbitration panel.

5. The parties shall participate in a mediation of this case on or before October 31, 2000.

6. Discovery disputes that may arise after the date of this order shall be addressed first to Judge Zimmerman, who shall enter a written order ruling on any such dispute. Appeals of any ruling by Judge Zimmerman shall be made to the arbitration panel. After Judge Zimmerman's order is entered with notice to the parties, the parties may file written objections to the findings and/or rulings in his order, and the arbitration panel may confirm, modify or reject the order as the arbitration panel deems proper and necessary. Any objections to the findings and/or rulings of Judge Zimmerman shall be filed by the objecting party

within five (5) business days of the party's receipt of same, and any response to such objections shall be filed by the non-objecting parties within three (3) business days of receipt of such objections. Any party may request a hearing on a party's objections or response to objections to the findings and/or rulings made by Judge Zimmerman. If no objection to Judge Zimmerman's findings and/or rulings is timely filed, such findings and/or rulings (or part thereof not subject to any objection) shall be deemed confirmed and adopted by the arbitration panel without further action by the panel. Any recommended orders by the Special Master pending on appeal herein after the date of this order shall be ruled upon as provided for in this paragraph.

7. Discovery in connection with the arbitration proceeding shall be conducted pursuant to the Texas Rules of Civil Procedure. Discovery subpoenas or other process may be issued under the authority of this Court during the pendency of this arbitration proceeding.

8. The arbitration panel shall have authority to issue an award of injunctive relief, summary judgment or other dispositive relief, and sanctions (which may include dispositive relief) subject to the terms of paragraph 9 of this order.

9. The arbitration panel's award, including any award of summary judgment or other dispositive relief, must be based upon the decision of at least two members of the arbitration panel. The final award and any award of summary judgment or other dispositive relief must be based upon written findings of fact and conclusions of law, which shall be issued within 30 days after the filing of the final award. Any award of injunctive relief shall be based

upon findings of fact and conclusions of law, shall set forth the reason for its issuance, shall be specific in its terms, shall describe in reasonable detail and not by reference to the pleadings or other documents the act or acts to be restrained, and shall be binding only upon the parties named in the final arbitration award, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the award.

10. All proceedings, testimony, evidence and deliberations in the arbitration proceeding shall be confidential. The arbitration hearings shall be attended only by the members of the arbitration panel, the parties, the parties' officers, agents and attorneys, and witnesses that may be called to testify in connection with the proceeding. The arbitration proceeding shall be recorded by a licensed court reporter to be agreed upon by the parties. The record of the arbitration shall be confidential. In the event of an appeal of any order or award of the arbitration panel or judgment of this Court based thereon, any party may designate portions of the record on appeal to be filed in this Court and/or the courts of appeals under seal in order to protect against disclosure of trade secrets.

11. The arbitration proceeding shall take place in Houston, Texas, at a location to be agreed upon by the parties.

12. The fees of Judge Zimmerman and any expenses of the arbitrators, such as rental or fees associated with the location of the arbitration proceeding and court reporter costs, shall be paid 50 percent by Plaintiffs and 50 percent by Defendants, provided that such costs shall be paid pro rata to the date of dismissal by any party that is

dismissed from the arbitration proceeding before its conclusion. The fees of the arbitrator designated by Plaintiffs shall be paid by Plaintiffs. The fees of the arbitrator designated by Defendants shall be paid by Defendants in equal one-third amounts (DSI Parties, Sterling McCall Parties and BSI), unless Defendants agree otherwise, provided that such fees shall be paid pro rata to the date of dismissal by any party that is dismissed from the arbitration proceeding before its conclusion.

13. The final arbitration award shall be subject to appeal, by way of a motion to modify, correct or vacate all or any part of the award filed in this Court and, thereafter, to the courts of appeals having jurisdiction, pursuant to the Texas General Arbitration Act.

14. To the extent not addressed herein, the rules of the Texas General Arbitration Act shall govern the arbitration. In the event of any conflict between the provisions of this order and the provisions of the Texas General Arbitration Act, the provisions of this order shall control.

15. This action shall be stayed, in hold for judgment status, during the pendency of the arbitration between the parties.

SIGNED this 2 day of October, 2000.

/s/ Lamar McCorkle
JUDGE PRESIDING

AGREED:

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NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	§	
DEALER SOLUTIONS, L.L.C., DEALER SOLUTIONS HOLDINGS, INC., STERLING MCCALL TOYOTA, STERLING MCCALL LEXUS, BUSINESS SOLUTIONS, INC., and ADP, INC.	§	133RD JUDICIAL DISTRICT

ORDER OVERRULING PLAINTIFFS' OBJECTIONS TO JUNE 15, 2000 ORDER COMPELLING ANSWERS TO INTERROGATORIES AND STAYING DISCOVERY BY PLAINTIFFS AND DENYING PLAINTIFFS' MOTION TO SET ASIDE THE JUNE 15, 2000 ORDER

(Filed Aug. 8, 2000)

Plaintiffs' objection to the Court's June 15, 2000 Order on Defendants' Dealer Solutions, L.L.C. and Dealer Solutions Holdings, Inc.'s Motion for Sanction, or in the Alternative, Compelling Answers to Interrogatories and to Stay Discovery by Plaintiffs' Pending Answers, and Plaintiffs' Motion to Set Aside Order are hereby OVERRULED and DENIED. The interrogatory answers required by the June 15, 2000 Order shall be served by Plaintiffs on all parties on or before September 18, 2000.

Any interlocutory appeal of this order must be filed on or before September 18, 2000.

SIGNED this 8 day of August, 2000.

/s/ Lamar McCorkle
JUDGE PRESIDING

NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
DEALER SOLUTIONS, L.L.C., and DEALER SOLUTIONS HOLDINGS, INC.	§	133RD JUDICIAL DISTRICT

ORDER ON DEFENDANTS DEALER SOLUTIONS, L.L.C. and DEALER SOLUTIONS HOLDINGS, INC.'S MOTION FOR SANCTIONS OR, IN THE ALTERNATIVE COMPELLING ANSWERS TO INTERROGATORIES AND TO STAY DISCOVERY BY PLAINTIFFS PENDING ANSWERS

(Filed Jun. 9, 2000)

The Court has considered Defendants Dealer Solutions, L.L.C. and Dealer Solutions Holdings, Inc.'s Motion for Sanctions or, In the Alternative, Motion to Compel Answers to Interrogatories and To Stay Discovery by Plaintiffs Pending Answers, Plaintiffs' response thereto and all other material matters, and ORDERS as follows:

1. Plaintiffs shall amend their answers to Defendants' First Set of Interrogatories, specifically interrogatories nos. 1, 3, 5, 6 and 7, to specifically and separately identify, as they have heretofore failed to do, as a joint and consolidated answer to such interrogatories, each particular process, formula, pattern, device, compilation

of information, or other matter that is the subject of this case that Plaintiffs contend is a trade secret accessed or misappropriated by Defendants, by separately stating each such trade secret and describing the nature, subject matter, and details of each such trade secret with sufficient particularity to show its unique and secret nature to separate it from the general knowledge of those involved in automobile dealership management and the specific knowledge of those skilled in automobile dealership management systems.

2. Such amended answers shall, without limitation specifically identify by stating and describing as provided in paragraph 1 above, each "functionality," "data field," "rule," "reflex," "structure," "design," "architecture," "negative knowledge," "method or process utilized for manipulation information," "trigger," "calculation code," "formula," "distribution," and "format, content, sequence, total structure and record selection of various reports," or other feature, function or element of Plaintiffs' automobile dealership management system or related written materials that is the subject of this case that Plaintiffs contend is a trade secret accessed or misappropriated by Defendants.

3. If Plaintiffs' claim that the overall "structure, architecture and design of its computer system as a whole" is a trade secret misappropriated by Defendants, Plaintiffs' shall specifically identify such system as a trade secret and describe with sufficient particularity how its' combination of identified trade secret and non-trade secret characteristics, features functionalities and components interact and work together, and are adapted, implemented, integrated and applied to form a whole unified process, design and operation which is unique and secret in combination and which separates it from the general

knowledge of those involved in automobile dealership management and specific knowledge of those skilled in automobile dealership management systems.

4. Plaintiffs shall not avail themselves of the option provided for by Rule 197.2(c) of the Texas Rules of Civil Procedure, except in the event that a specific business record may be designated by Plaintiffs in their answers as specifically describing an identified trade secret, because the burden of deriving or ascertaining the answer to Defendants' interrogatories is not substantially the same for Defendants as for Plaintiffs with respect to the information requested by such interrogatories and required to be provided by this Order.

5. The interrogatory answers required by this Order shall be served by Plaintiffs on all parties on or before 5:00 p.m., June 19, 2000. Plaintiffs shall conduct no discovery in this case until Plaintiffs have complied with this Order. The Defendants may continue to proceed with discovery in this case.

6. Plaintiffs shall pay Dealer Solutions, L.L.C. and Dealer Solutions Holdings, Inc. $500.00, representing their reasonable attorney's fees incurred in filing and presenting this motion. Tex.R.Civ.P. 215.2(b)(2).

SIGNED this 15 day of June, 2000.

/s/ Lamar McCorkle
Judge Presiding

NO. 19[illegible]-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT OF
	§	HARRIS COUNTY, TEXAS
VS.	§	
DEALER SOLUTIONS, L.L.C., and DEALER SOLUTIONS HOLDINGS, INC.	§	133RD JUDICIAL DISTRICT

ORDER DEFENDANTS DEALER SOLUTIONS, L.L.C. and DEALER SOLUTIONS HOLDINGS, INC. COMPELLING ANSWERS TO INTERROGATORIES, STAYING DISCOVERY BY PLAINTIFFS, AND FOR SANCTIONS

(Filed Apr. 12, 2000)

The Court has considered Defendants Dealer Solutions, L.L.C.'s and Dealer Solutions Holdings, Inc.'s motion to compel answers to interrogatories, to stay discovery, and for sanctions, Plaintiffs' response thereto and all other material matters, and orders as follows:

1. Plaintiffs shall amend their answers to Defendants' first set of interrogatories, specifically, interrogatory nos. 1, 3, 5, 6 and 7, to state specifically the identity of each "functionality," "data field," "rule," "reflex," "structure," "design," "architecture," "integration or combination of various components," "negative knowledge," "method or process utilized for manipulation information," "trigger," "calculation code," "formula," "distribution," and "format,

content, sequence, total structure and record selection of various reports," or other feature, function or element of Plaintiffs' automobile dealership management system or related written materials that is the subject of this case that Plaintiffs contend is a trade secret accessed or misappropriated by Defendants. Each trade secret claimed by Plaintiffs shall be separately identified by them in such answers. Plaintiffs' answers to such interrogatories may be made as one consolidated answer.

2. Plaintiffs shall not avail themselves of the option provided for by Rule 197.2(c) of the Texas Rules of Civil Procedure, except in the event that a specific business record may be designated by Plaintiffs in their answers as specifically describing an identified trade secret, because the burden of deriving or ascertaining the answer to Defendants' interrogatories is not substantially the same for Defendants as for Plaintiffs with respect to the information requested by such interrogatories and required to be provided by this Order.

3. The interrogatory answers required by this Order shall be served by Plaintiffs on all parties on or before 5:00 p.m., April 17, 2000. Plaintiffs shall conduct no discovery in this case after April 15, 2000 until Plaintiffs have complied with this Order. The Defendants may continue to proceed with discovery in this case.

4. Plaintiffs shall pay Dealer Solutions, L.L.C. and Dealer Solutions Holdings, Inc. $250.00, representing their reasonable attorney's fees incurred in filing and presenting this motion. Tex.R.Civ.P. 215.2(b)(2).

SIGNED this 12 day of April, 2000.

/s/ Lamar McCorkle
Judge Presiding

NO. 1999-11466

UNIVERSAL COMPUTER SYSTEMS, INC., ET AL	§	**IN THE DISTRICT COURT OF**
VS.	§	**HARRIS COUNTY, TEXAS**
DEALER SOLUTIONS, L.L.C., ET AL	§	**133RD JUDICIAL DISTRICT**

ORDER
DEFENDANTS' MOTION TO COMPEL ANSWERS TO INTERROGATORIES

(Filed Mar. 10, 2000)

On February 25, 2000 Defendants' counsel certified that it had that day forwarded to Plaintiffs' counsel Defendants' Motion to Compel Answers to Interrogatories.

Defendants' motion is GRANTED. Answers shall be served to Defendant by Plaintiff on or before March 29, 2000 at 5:00 p.m.

SIGNED this the 10 day of March, 2000.

/s/ Lamar McCorkle
Judge Presiding

[SEAL] OFFICIAL NOTICE FROM
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Austin, Texas 78711-2248

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RE: Case No. 06-0070 DATE: 4/21/2006
COA #: 01-04-01088-CV TC#: 1999-11466
STYLE: UNIVERSAL COMPUTER SYSTEMS, INC. ET AL.
v. DEALER SOLUTIONS, L.L.C., ET AL.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:

MR. JOHN C. ALLEN
LAW OFFICES OF JOHN C. ALLEN
909 FANNIN SUITE 1225
HOUSTON TX 77010

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

[Postage Meter Stamp]

RE: Case No. 06-0070 DATE: 6/9/2006
COA #: 01-04-01088-CV TC#: 1999-11466
STYLE: UNIVERSAL COMPUTER SYSTEMS, INC. ET AL.
v. DEALER SOLUTIONS, L.L.C., ET AL.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:
MR. JOHN C. ALLEN
LAW OFFICES OF JOHN C. ALLEN
909 FANNIN SUITE 1225
HOUSTON TX 77010

REC'D JUN 12 2006

IN THE MATTER OF THE
ARBITRATION REFERRED FROM

NO. 99-11466

UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC.	IN THE DISTRICT COURT OF
Plaintiffs,	
VS.	
DEALER SOLUTIONS, L.L.C., AND DEALER SOLUTIONS HOLDINGS, INC., AND ADP, INC.	
Defendants,	
ADP, INC.,	
Counterclaimant,	HARRIS COUNTY, TEXAS
VS.	
UNIVERSAL COMPUTER SYSTEMS, INC., UNIVERSAL CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., AND DEALER COMPUTER SERVICES, INC.	
Counterdefendants.	133RD JUDICIAL DISTRICT

ARBITRATION HEARING
JUNE 2, 2003 TO JUNE 20, 2003

* * *

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[58] preemption is a matter of federal law; and the federal law courts have not said that the Texas law is right. The majority rule in the federal courts is that there is no preemption where there is the extra element. And that's precisely what we have in this case.

Now, by way of further background – and I think that you'll see how well it fits into this case in terms of what UCS is trying to protect – you'll see in – in Professor Davis' article that's in Mr. Brockman's report – Professor Davis is – is an M.I.T. professor, and he opines and he describes the issues as it relates to protecting software kind of in these three categories: Where you have something that's real clear and it's written down, like the code, where you have a written code, that's something that is subject to copyright.

Where you have something that is an invention that is completely novel, on the – on the other extreme, that's a situation that is subject, potentially, to patent law.

But, in the middle, in-between what can be copyrighted and what can be patented, in the middle is what they call – or what Professor Davis' – and it's their expert. This is Professor Davis for the [59] defendants – Professor Davis says that there is behavior of software that must be protected; and that the way that it must be protected, because you can't copyright it, and you can't patent it, it must be protected by the trade secret law. And that's what we have right here.

Professor Davis provides this example: When you go to the store and you buy software, or you go and contract for software, you don't go and look at the – at the source code to see if it's copyrighted or not. What you're interested in is the function of that software, what that

software does when you're sitting in front of the screen and using that software. That – that is exactly what – what UCS is protecting in this case, and you'll see that.

There is a body of functionality in this software that's not subject to copyright. It's not subject to patent. It is a body of behavior that is subject to patent. It is a body of behavior that is subject to the trade secret law and is protected, and particularly falls outside the scope of copyright law when you talk about the extra element that exists; and that is the breach of the confidential relationship by Sterling McCall.

Finally, I think it's important that [60] Business Solutions and Sterling McCall have not pled the defense of preemption; therefore, to the extent that that is – it would still be an issue in this case, and I think is subject to litigation in this forum, and to think to cut out ADP, even if you thought there was some merit to that, which I'd submit that there is not, would – would just splinter the case, which would be judicially inefficient.

That's all I have. Thank you.

ARBITRATOR ZIMMERMAN: We're going to take a morning break for 20 minutes.

Before we let you get away – I'm sorry – two clarifications: In the order – agreed order to stay action and compel arbitration, paragraph 3 of page 2 says the final award shall be filed no later than December 30th, 2002, subject to further orders of the court.

Where do we stand in terms of a stipulation that it will now be filed 30 days after the conclusion of this hearing, which will be whenever that 30 days is, sometime in July?

MR. ALLEN: Judge, that is set forth. We've agreed to the scheduling order that we set forth in the order that the Panel has signed in [61] this case, and it provides for that.

ARBITRATOR ZIMMERMAN: That date is covered there?

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: Okay. Thank you.

MR. HARRISON: Judge Zimmerman, if I could note: I know that the Panel wants to take a break. So do we. But I do want to note that if we could have a few minutes to reply to some of the things that were just said before a ruling on this issue, I'd appreciate if we were given that.

ARBITRATOR ZIMMERMAN: Well, let's be seated and reply.

MR. HOLTZ: And it really should just take a few minutes.

First of all, I'll just address each of Mr. Allen's three points.

He points to the order that he attached to his last motion. It's an agreed order to stay action and compel arbitration. It's not a contract. I agree with Mr. Allen that, in theory, we could have – DSI and ADP could have contracted with UCS to arbitrate all disputes, a contract, outside of a judicial proceeding. But the agreed order is not a [62] contract. Judge McCorkle signed it. That's what made it an order. All – we just stipulated that what is in

Judge McCorkle's courtroom will be referred to the Arbitration Panel. Jurisdiction is derivative of the state court.

When – I just also want to point you to paragraph 13 of that order, which says "The final arbitration award shall be subject to appeal in this court," in Judge McCorkle's court. So, if this – if the Panel – Judge McCorkle cannot have jurisdiction by way of his own order that didn't otherwise exist. Neither Judge McCorkle, nor this Panel by way of Judge McCorkle, has jurisdiction over these issues.

Secondly, Mr. Allen says that, "Well, look. We're just claiming that the ideas underlying our software, that's our real claim." And they cite our brief. All we did was – was quote the Copyright Act. It is true. One cannot copyright, as I mentioned earlier, an idea, a fact, a law of nature, et cetera, et cetera. But that's a different inquiry. That's whether or not one has a remedy under the Copyright Act. That's got nothing to do with preemption. One – one can have a claim that's within the subject matter of copyright, such [63] as computer software, such as a film, such as a novel, and there are still lots of elements that aren't copyrightable, aren't protected under the Act.

And again, we can turn to Justice Andell in Butler. He addressed this exact same point. The plaintiff in that case faced the same problem as UCS faces. And they said, "Well, Butler argues that his valuable contribution to Continental was his "idea," in quotes – in other words, a noncopyrightable matter – "to write the macros," which he termed as a moment of clarity.

"We are not convinced by these semantics. Butler's suite is based on the computer macros he wrote which he claims Continental copied onto multiple dumb terminals

for use by its reservation agents. Butler's claim is that Continental copied and misappropriated the computer macros he authored. For the reasons discussed below, computer macros are the subject matter of the Federal Copyright Act and preempted."

So, just because something is not protected under the copyright law doesn't mean it's not subject to the copyright law. That's – that's the preemption rule generally. Defendants always [64] raise preemption because they want you to look at the federal law that exclusively governs the dispute. It might offer more protection than the state laws; it might offer less. In this case, it – it offers less.

Lastly, Mr. Allen quotes a speech that Professor Davis gave. Professor Davis is not a judge. He's not even a lawyer. Professor Davis was just opining on sort of the way he thought computer software should be treated under the law. In other words, how it should be, not how it is treated under the law.

And, secondly, Mr. Allen is simply wrong. The computer program functionality certainly can be patented. I'd like him to just look up the thousands and thousands of computer software patents that exist. That's one of the reasons Microsoft has a monopoly on certain things they do. They create a new function; they patent it.

That's what UCS has done in certain parts of its software. It has an encryption method that it developed in its software. It has a patent on that. A small, small part of its program is patented. The patent laws cover the processes. The copyright laws cover the structure, architecture, [65] design, and the literal code. And this Panel nor any state court has jurisdiction over either one of those issues.

ARBITRATOR SOUSSAN: I have one question. In the first sentence of the Agreed Order –

MR. HOLTZ: Yes.

ARBITRATOR SOUSSAN: – it says here that the parties' agreed motion to stay this action and compel arbitration is granted. So, prior to the court entering this order, I read this as the parties did agree to submit all claims to arbitration. Am I reading it wrong?

MR. HOLTZ: Oh, we did agree to submit all claims to arbitration; but – but that necessarily is – I mean, as a rule of law is limited by claims that are properly before the court. I mean, that's just – it has to be read that way. One can't agree in a state court order to submit claims over which there is no jurisdiction in the state court, you know, just – I don't see how one can get around that.

MR. HARRISON: If I could just –

MR. CASH: Actually, I just want to be very brief.

* * *

[70] MR. HOLTZ: I don't have a case. It's – it's just not an issue.

MR. CASH: I will bring a case that says you cannot, by agreement, confer jurisdiction.

ARBITRATOR ZIMMERMAN: That's not my question.

MR. CASH: Okay. But do I have anything that says a Rule 11 agreement is not a contract between the parties? We have a separate contract; so, I was really

never looking to the Rule 11 as a contract. My position is simply that this court doesn't have jurisdiction. So, I guess that would be my punt back.

MR. HOLTZ: But I think a Rule 11 agreement is binding to the extent it can be enforceable, but it can't be enforceable to confer jurisdiction, which gets me back to my issue: You cannot confer jurisdiction on courts that don't have it.

ARBITRATOR ZIMMERMAN: One of the things that I had referenced early on in this dialog is this kind of unique situation that we have – and if anybody has a case, the Panel is vitally interested – we understand that you may not confer jurisdiction by agreement upon courts when you're [71] staying within the court system. The issue that we raise, which is unique to this, is may parties confer jurisdiction in arbitration that they otherwise would not have in a court?

And Mr. Allen is taking the position that you have, vis-a-vis, not less than an Agreed Order, with an Agreed Order being the equivalent to a contractual agreement among the parties, and/or that the Agreed Order is equivalent to a Rule 11 agreement and/or that if you have a Rule 11 agreement or Agreed Order for arbitration that says the – the issue – the claims raised or to be raised, that that gives him the freedom to plead further causes of action.

And we're just inquiring whether or not there is any case law with this unique issue of conference to arbitration and arbitration expanding what may be the traditional role of limitation of jurisdiction.

MR. HOLTZ: Well, if I could just address one thing.

I – first of all, no, I don't have a case addressing that, although we're happy to look into that; but I can just point you to the arbitration referral's order.

[72] What this Panel has been referred and – and delegated is to determine the issues in this case and issue, an order. Judge McCorkle is the one that enters judgment. Judge McCorkle is the one that hears any appeals of what this Panel determines, and the Houston state court of appeals on top of that.

Those courts have to have jurisdiction. We – I don't see how the Judge could expand his own – Judge McCorkle could expand his own jurisdiction by sending out issues to a Panel, whereby it's expanded, and then have them come back to him.

MR. HOWARD: I would just reiterate that point. The order is actually defective on its face. Judge McCorkle has attempted to confer jurisdiction on himself in a preempted copyright case. He can't do that.

ARBITRATOR SOUSSAN: Better call Judge McCorkle.

ARBITRATOR ZIMMERMAN: Okay.

MR. LAYCOCK: Your Honor, I came to talk about the remedies issues; but I do have one piece of information that speaks indirectly to your question about the uniqueness of this situation.

[73] But the Supreme Court of the United States has held, the parties can settle an antitrust case, which would

be within the exclusive jurisdiction of the federal courts, they can settle that in a state court proceeding; and that settlement is binding.

Now, that's not exactly this situation, but it's analogous, because everyone agrees, I think on both sides, that the parties could contract to submit this dispute to arbitration; so, think of that as sort of a partial settlement. "We are not going to litigate it. We're going to give it to the arbitrators. We will give them authority by virtue of our agreement."

And – and the Supreme Court case that says you can settle cases with an exclusive jurisdiction in the federal court would seem to me support, by analogy, the view – you can submit – you can make this arbitration agreement even though the arbitration agreement grows out of a state court proceeding.

And then, finally, just so it doesn't get lost sight of, let me remind you of what Mr. Allen said: Preemption is a federal question, but the majority federal rule is the extra element of a trade secret claim or any other claim means that [74] it's not preempted, that federal rule controls even if there are some minority cases in Texas that go the other way. It's a federal question, not a state question.

ARBITRATOR ZIMMERMAN: Okay.

We will be in recess until about 11:00 o'clock.

(Brief recess.)

ARBITRATOR ZIMMERMAN: Gentlemen, due to the graviment of the situation, the Panel is going to defer ruling on the – the present issue that is before us; i.e., the jurisdictional question of the Panel's authority on

– on copyright. We – and, in part, that decision is a result of being served with a new argument that we had not considered prior to this morning when you presented your brief or response to us.

Secondly, we would invite you, because of the uniqueness – at least as we see the uniqueness of this issue that I had verbalized to you before we broke – i.e., whether or not there is case law that suggests that when a matter is – well, let me rephrase.

Our conflict as a Panel right now centers in part around the notion that if there is an [75] agreement to arbitrate by the parties, it seems as though there is a tendency to lean towards denying a motion that – to limit the authority of this Panel on the copyrightable issue. If we look at this order in terms of a state court judicial referral, then one can better understand that there would be a suggestion that this Panel should have no greater authority than the state district court.

But we are confronted with an order that is termed "Agreed Order." We are confronted with an order that the parties chose to go into arbitration rather than have a state district court decide issues before the state district court, for whatever reasons entered the thinking process of the parties.

And, therefore, because of that tension between an agreement of the parties to arbitrate matters that's so stated in this arbitration order in paragraph 3, page 2, being the matters raised in the pleadings, or that may be filed in the arbitration proceeding, under an Agreed Order, whether we should look more carefully to the authority of the directing court or look more to the agreement of the parties to arbitrate disputes.

And since neither party has really provided us cases in that regard, since you were not [76] aware of what was in our thinking at the time, we would invite not so much briefing but any cases that can be brought to our attention. Maybe if there is one or two key note cases from either side, you could deliver us three copies so that we could review it tomorrow and can continue to deliberate over this worthy issue.

May we have the next point?

MR. HARRISON: Just again, to know where we are at this stage, and for the record, has the Panel deferred or decided on the issue of subject matter preemption of the state law claims?

ARBITRATOR ZIMMERMAN: Deferred.

MR. HARRISON: Thank you.

MR. CASH: Judge Zimmerman, do you need any further cases on the preemption issue since they're separate? There is preemption, and there is jurisdiction.

ARBITRATOR ZIMMERMAN: No.

MR. CASH: They're completely separate issues.

ARBITRATOR MCGOWAN: No.

MR. CASH: You're fine on the presumption issue? All right.

MR. HARRISON: Our next motion among [77] the pretrial motions, Your Honors, is the defendants' motion in limine, and the motion in limine addresses three separate issues. The first is addressing, of course, the scope of the evidence plaintiffs are to be permitted to use

to prove their trade secret; and that addresses, of course, the evidentiary restriction imposed by the trial court's May 9, 2002, order which was then reaffirmed by the court on July 29, 2002.

The second issue addresses the damages evidence that the plaintiffs may be permitted to offer, given the state of the work done by the plaintiffs' damages expert.

And then the third addresses supplemental evidence that we anticipate may be offered by the plaintiffs' evidence which was served on us for the first time last week, and that relates to the UCS review of Sterling McCall backup tapes and then their work to discern information concerning who was using the system at various points in time and their analysis in that regard.

With regard to the first issue, this is really the – the controlling issue, in our view, with respect to a great deal of the scope of this case; and that is, the extent to which the Panel is [78] going to observe Judge McCorkle's May 9 order in which the plaintiffs' claimed trade secret is limited to a single trade secret, and the plaintiffs' evidence is limited to a single set of interrogatory answers.

I have a collection of the discovery orders that were issued with regard to that issue. And then also in this notebook, we've included a couple of the pleadings that relate to the same issue. And I think throughout this proceeding, it's going to be important to have these orders; and since these were issued out of the trial court, I don't think they're in the Panel's collection of records, at least in this format.

And what we've included in this notebook, is the series of orders that were issued by Judge Bianchi as the

Special Master, and then entered by Judge McCorkle in the trial court. And in at least, I think, two instances, the orders addressing UCS's objections to those orders are also included. Certainly, the last, July 29, 2002, order that confirmed the May order is included in the notebook.

Now, where – we have a long history that led up to this; and I don't really want to – we've addressed that history that led to the May 9, 2002, [79] order in our briefing. I don't want to spend time going through every event, every motion, every order for sanctions that led up to the May 9 order, unless the Panel, for clarification, might need for me to.

But where we ended up, after several motions in this case seeking that the plaintiff describe and identify what they say their trade secret is, was with, first – I say first. Actually, about fourth – an order issued by Judge Bianchi and then entered by Judge McCorkle that entered a presumption that the plaintiff didn't have a trade secret. This was after prior orders for sanctions, prior orders that specified the manner in which the trade secret has to be described to be sufficient.

And, finally, Judge McCorkle entered an order, at Judge Bianchi's recommendation, saying there is no trade secret – at least that's the presumption now – and the plaintiff will have one last chance to describe its trade secret sufficient to comply with the court's prior orders specifying how it should be described or the case would simply be dismissed for discovery briefs.

At that point, the plaintiffs served their February 21st, 2000-2001 interrogatory answers. [80] And I have copies of the interrogatory answers, as well.

And after receiving those interrogatory responses, we were still of the view that the plaintiffs had not complied with the trial court's June 15th, 2000, order that specified how the trade secret was to be described; and we filed a second motion to dismiss their case for discovery abuse.

At that point we had a hearing on May 31st, 2001, before Judge Bianchi; and we argued to Judge Bianchi that they still hadn't complied, that the presumption that there simply was no trade secret should be turned into a final order dismissing the case.

At that hearing, UCS's counsel argued that their February 21st interrogatory answers were the best that they could do to describe their trade secret. And they said, "We have described our trade secret as well as we can. This is all we can do." And the defendants are just, you know, trying to get out of this case on a discovery sanction instead of trying the case on the merits as to whether or not there was a trade secret.

Judge Bianchi then essentially crafted an order that avoided the dismissal of the case but [81] entered a very severe restriction with regard to the plaintiffs' evidence. And what he did was say two things: He – he identified what the trade secret that the plaintiffs' can claim in this case was, because that had been a moving target for two years.

At points, the plaintiffs would say: Well, it's our functionality; and it's the triggers and reflexes that our software follows and the behavior of the programs. At other points in time they would say: Well, it's our applications. And at other points in time, they would say: Well, it's just the whole ball of wax.

Finally, having addressed this through these motions, and at that hearing, Judge Bianchi identified what the trade secret that the plaintiffs could claim would be; and in the May order, paragraph 6, he ordered, "Plaintiffs have stipulated that the only trade secret being claimed by the plaintiffs in their action is the overall structure, architecture, and design of their computer system as a whole and not any individual process, formula, pattern, device, or compilation of information or other matter."

And so there he set what the definition of the trade secret in general terms was, and that was [82] the architecture of UCS's entire dealer management software system.

Then, taking counsel for UCS at his word, and imposing a sanction short of dismissing their case, he said in paragraph 6, "Plaintiffs' evidence identifying and describing their claimed trade secret shall be limited to their interrogatory responses served on February 21st, 2001, which plaintiffs have stipulated are a complete description of their alleged trade secret."

So, what Judge Bianchi and Judge McCorkle did by way of this May 9 order was to say, one, the trade secret that the plaintiffs contrived to claim is the architecture of their system as a whole and not any individual piece, formula, pattern, device, or compilation of other information in the software; and then secondly, he said, the way that they can prove what that trade secret is, is by way of referencing and offering the February 21st interrogatory responses and nothing else.

That was the only way to finally pin down this claim and to come short of dismissing the case for the plaintiffs' refusal to ever say what their trade secret was.

The motion in limine is to ensure that [83] this order will be enforced by the Panel. We still have not gotten any identification or description of this software system architecture other than these February answers. We anticipate that the plaintiff is going to come in and claim all sorts of new trade secrets in this case, things that we haven't heard of before, things that have never been articulated, despite these two-and-a-half years of discovery motions, each one which we succeeded on, each one imposing successively severer sanctions and restrictions until we got to the May 9 order.

We want to ensure that the scope of this case is limited to the sole trade secret that the trial court said should be at issue in the case and to the only evidence that the trial court said the plaintiffs could offer to identify that claimed trade secret; that is to say, the February 21st interrogatory answers are the plaintiffs' evidence of what the architecture of their system is, and that's where the trade secret case begins and ends, in light of the court's order.

The second part of our motion in limine addresses the plaintiff's damages claim. The plaintiffs have presented a damages claim that they call a claim for unjust enrichment. They have [84] expressly stated that they are not trying to claim profits earned by the defendants in this case.

As the court knows – or as the Panel knows, their claim for lost profits on their own part – that is, not the defendants' gain by way of profits, but the plaintiffs' potential claim for lost profits has been stricken from the plaintiffs' allegations in this case.

And what the plaintiffs' have presented by way of their damages case and their damages witness is a claim for unjust enrichment where they say the gain that the defendants have had as a result of this claimed misappropriation of the structure, architecture, and design of UCS's system as a whole should be measured in two ways: They say first, with regard to ADP, that the company stock acquisition price is the starting point for measuring the company's – that is, ADP's – unjust enrichment resulting from their claimed misappropriation of UCS's claimed trade secret.

And then they take out hard assets shown on the balance sheet; and the expert opines that anything that's left is unjust enrichment damages, the gain of the company, Dealer Solutions, as a result of the taking of the UCS's claimed trade secret. [85] It's a balance sheet goodwill calculation.

Then, as to the damages claim as to dealer – as to ADP, UCS's damages witness says that unjust enrichment should be measured by looking at what ADP projected it would earn in the future from the next generation product that the CARMan software was supposed to contribute to.

And she's looked at 1999 projections that were performed by ADP in connection with the acquisition due diligence, and she's taken a range from those projections and taken out the purchase price for the company paid by ADP; and they say the remaining difference is the range of ADP's unjust enrichment.

Now, there are terrible legal and factual problems with both of those claims; but the point of the motion in

limine is not to say – limit out all of their claims. We've got another motion with regard to Ms. Webster's testimony that addresses that issue.

Our concern is, I think, that having seen the difficulties with this so-called damages case, the plaintiffs are going to try and shift gears on us in this proceeding. I think they're going to try to abandon Ms. Webster's approach and that they're

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[114] And she has compiled multiple data points for estimating that value. She says – first of all, she's got the merger price. Okay. What did ADP actually pay for it? It's a measure of what it was worth.

Second, she's got ADP's internal evaluations as a measure of what it was worth.

Third – and there is more than one of those.

Third, she's got the evaluations by DSI's investment bankers. There is more than one of those. That's another measure of what it was worth.

Four, she's got the development costs of other failed efforts by other competitors to do the same thing. That's a measure of what it's worth.

And, five, and she didn't have a number for this, she's got Mr. Brockman's estimate of how important it was to UCS's business and to UCS's competitive position. The cases say, the plaintiffs' estimate, how important is it to him, what would he have demanded for it, is also admissible.

So, we've got five different sets of estimates of what this information was worth. Some of those estimates – some of those – some of those [115] five categories have two or three or four different estimates in them. Not surprisingly, there is a range; but there's a fair amount of – of congruence. And, in fact, the merger price is one of the most conservative. I think it's the second or third lowest of all the different estimates of what this information was worth.

Now, this is partly their other motion, but it's all – it's sort of all interconnected, you know. She has to say how much – some of these estimates were for the value of DSI as a company. How much of that was the trade secret? She didn't ignore that question. She addresses that in her expert report. And there will be competing evidence about that, but she backs out the things that she believes were unrelated to trade secrets that ADP and DSI's internal documents suggest were unrelated to the – to the trade secrets.

So, we've got multiple estimates of what the value of the information was. Each of the defendants received the information Each of the defendants didn't pay for the information Each of the defendants was enriched – enriched by the values of the information. And that's – that's all pretty straightforward restitution and trade secret [116] law. As I said, it's in the restatements. It's in – it's in the treatises.

And, really, what the – what this particular motion in limine seems to be about is that the economist confused the legal vocabulary. The Panel can sort out the legal vocabulary. We have given you the cases. We have briefed it. I'll save other things for their second motion to – to

exclude the testimony. But certainly there is no element of unfair surprise here.

Lykes-Youngstown is the leading reasonable royalty case. It's been in the briefing of these damages issues from -- from the very beginning; and, you know, that they got -- got answers to legal questions from an economist, they confused the vocabulary a little bit, is -- is certainly not a reason to exclude the theory that the evidence supports and the theory that has been in the briefing of these issues from the very beginning.

ARBITRATOR ZIMMERMAN: Thank you, Professor.

Anything else, Mr. Allen, from you?

MR. ALLEN: No, sir.

ARBITRATOR ZIMMERMAN: Okay.

MR. HARRISON: I'll respond to each [117] on the three issues.

You know, Mr. Allen taking that May 9 order and describing it as a victory is like the Iraqi defense minister out in the desert declaring victory when the heads of the statutes are -- statues are being yanked off in Baghdad.

This was the last and most severe sanction order that UCS received for two-and-a-half years of gamesmanship and discovery abuse, and this is the order under which Judge McCorkle directs that the case here should be tried.

Now, if you look at the language of that order, Mr. -- Judge Bianchi didn't find that UCS had any trade secret. He defined the one trade secret, when he finally got Mr. Allen pinned down in his conference room, that UCS was

going to finally commit to. He said the trade secret is only the structure, architecture, and design of their computer system as a whole and not any individual anything else.

And then he imposed the evidentiary restriction. Instead of dismissing the case, which he would have been well within his rights to do, and which he had fully postured himself to do with increasing sanctions, imposing a presumption of no [118] trade secret, instead of dismissing the case, he said, "Fine. If this is your best effort in describing your architecture of your system as a whole, you've got it."

And that's the only evidence that the plaintiffs can use in this case. It's fatal to their case. It is a death penalty sanction. Let's make no beef about it. This list of fractional elements of pieces of computer software doesn't describe anything, and it sure doesn't describe architecture. Their experts have agreed to that point. Their head of programming has agreed to that point. These interrogatory answers end the case, because to describe the architecture of a software system, you've got to have all sorts of information and detail. It's like describing architecture of a building, and then Judge Bianchi limiting them to the window frames and the doorknobs.

That's where UCS is in this case, and that's why they want to try and wiggle around this order. But it's this order that Judge McCorkle sent to this Panel. UCS, in their great victory here, appealed this order twice. They tried to block Judge McCorkle from finally entering this order because they wanted to get the case over to [119] arbitration and duck and weave for a few more years.

They lost both appeals. Judge McCorkle said, "We are not going to arbitrate until this issue is resolved." And

they went directly with a mandamus and a regular appeal to the court of appeals to try and prevent any ruling on this issue. And now, they want to declare it a victory.

In their objection filed a day after the May 9 order, UCS said, "The order limits evidence to one response of five supplemental responses to interrogatories. The Special Master has no authority to deny UCS the right to supplement its interrogatory responses." Well, guess what, Rule 215 does give that authority; and Judge McCorkle confirmed it again on July 29 after UCS made that argument.

ARBITRATOR ZIMMERMAN: Excuse me. Which order is that in that you just referred to?

MR. HARRISON: What I was just reading from was UCS's objection to the order, the one that they won so big on.

ARBITRATOR ZIMMERMAN: Oh, UCS's objection. Okay.

MR. HARRISON: And it's behind the last tab in your notebook –

[120] ARBITRATOR ZIMMERMAN: Right

MR. HARRISON: – in paragraph 8.

So, for Mr. Allen to say, "We can freely amend interrogatory answers, we're not limited by this," is to say, "Well, the argument that I made and lost in the trial court before this case was referred gets to be made again."

But the argument shouldn't succeed anyway. Sanctions, evidentiary limitations, are authorized; and that's exactly what was intended by the May 9 order.

Now, if UCS contends, as they're ordered to do, that their trade secret is the architecture of their system, then let them prove it with the February 21 interrogatory responses; but as we've said repeatedly in this case since 1999, UCS has to say what its trade secret is. And if it can't be traced into the February 21st answers, it's not relevant; and if the February 21st answers don't describe software architecture, there is no case.

And that's exactly what Judge Bianchi and Judge McCorkle intended. Let's not just give them death penalty of discovery sanctions. Let's let them see if they can prove their case, after five orders, with the evidence that we're going to accept [121] them at their word as this is a complete description of our trade secret.

So then, to wiggle some more, UCS' counsel says, "Well, we have got a lot of other causes of action. We have got all this other misappropriation and tortious interference and everything else."

All of that depends on the trade secret. There is no cause of action under any of those other claims for anything other than use, improperly, of a trade secret. There is no such thing in Texas as some sort of general confidential information.

The Stewart & Stevenson case that we've given you makes that plainly clear. They've reviewed every Texas case that's used the term "confidential information" and noted that in every case it involved a trade secret. Where the court submitted a jury issue about confidential information, it was defined as a trade secret. Where the court gave an award, it was on a trade secret issue. In every case.

If there was something less than trade secrets, if there was some kind of loose confidential information protectable in Texas or anywhere else, why would we have trade secret law?

The point is that, again, all of the [122] causes of action are limited by the – the May 9 order; and to try to say, "Well, we're going to run around that by saying, 'Well, it just doesn't really apply,' or 'We've got different causes of action,'" is to ignore what Judge McCorkle says this arbitration is supposed to be about.

Now, with regard to this damages argument, this is not a matter of semantics. UCS's expert very clearly, in her report and in her testimony, understands what a reasonable royalty analysis in intellectual property is. She's done them before. She said she didn't do one in this case.

If the professor wants to make it an issue of semantics, let's take his semantics. He says there are two basic measures of unjust enrichment. One is market value, what the defendant received and that's the reasonable royalty measure; and two, what the defendant got from using it, and that's the measure UCS has elected in this case.

This isn't a reasonable royalty case. She is arguing for two untenable measures of unjust enrichment; and the fact that there are – what were they called – multiple data points that would support a reasonable royalty analysis in this case is interesting, but they weren't used. What she [123] claims is unjust enrichment to the exclusion of reasonable royalty, which she knows all about.

So, the professor can say that she was confused, but she very expressly states, "I am not doing a reasonable royalty analysis, and I know what one is; and I am doing

an unjust enrichment measure based on what the lawyers have told me to use, and that was purchase price of the company and expected anticipated benefits." Her term. Something not recognized in this State or really in any civilized country as a measure of damages. But that's what they've come with.

And now, seeing again that their case is just fatally flawed, and us knowing that this was coming, we've put it on the table. Don't let them come in now and rejigger their evidence and their testimony and their semantics to argue for a reasonable royalty measure of damages, which is a well-established measure, well-established factors. Their witness knows them, and she testified that she didn't use them in this case.

To go back and redo the damages in this case by their expert and then by ours would require that we adjourn the case and go out and do reasonable royalty analysis, which neither side has [124] done. That's why we put it on the table, because we saw it coming once they saw how absurd their damages case is. But it's what they're stuck with.

And with respect to the backup tape information, the issue is just plainly that UCS, in control of this information since last year, dropped it on us last week; and it's just too late for us to respond to it. We don't have the information that they have about what they did. We know nothing about what Mr. Brockman is going to opine about with regard to this information. All we have is a deposition of a computer programmer who did a snippet of the work to generate the conclusions that now are supplemental volume, 6 inches, Number 2 in what we got. It's unfair. It's a surprise. It's not necessary to the plaintiffs' case, and it should not be admitted at this late date.

Thank you.

MR. CASH: And following up on the backup tapes, you know, it's interesting, it's – I went along with the order. I followed all the steps. Agreed. And had he wanted to put in that order, "We further agree that these documents may be produced after the discovery cutoff," we could have done that.

[125] Now, he talks about everybody doing discovery all the time. The parties are free to agree to do certain discovery afterwards. We have not noticed a deposition. We haven't asked an interrogatory, and we haven't produced a document after the cutoff. So, what everybody else agrees to, there is nothing on us.

He says he complied with this order. We ask that you comply with all. April 26th was the cutoff. We got nothing. But I'm willing to compromise. Because he talks about how generous they were, and they gave us this. They said, "Here you go. They gave us this.

Well, let's take out all of Mr. Brockman's commentary, he not be allowed to testify on it at all, and the documents just have to sit as they are with no commentary, no argument, no testimony, no nothing, just the pieces of paper. They can't be referred to, and they cannot be mentioned, because that's what we have. You know, he said we've had these backup tapes the whole time. It's like having an eight track, and he's got the only eight track player.

Great. We've had them. They're super paper weights. There is not a thing we can do with

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[134] but that is not what I said. I said there are two measures of unjust enrichment; consequential gains and reasonable monetary market. I didn't say that those two measures were the same. I said they are both measures of unjust enrichment

ARBITRATOR ZIMMERMAN: We're going to break at this point until 2:00 o'clock.

In the future, you may talk among yourselves about the prospect of having lunch brought in for you so you don't lose time, you know, walking or driving to any of the restaurants around here and fighting the noon hour issue that – that that entails; but we're not saying you do that, were just suggesting to you that may be a more efficient way to use your time. But we will see you back at 2:00 o'clock.

MR. BROWN: Before we break, can I have one housekeeping matter?

My client representative is here, but he is really the lifeblood of his organization. I see that other representatives aren't staying for the entire proceeding. He was going to not return after lunch and perhaps return sporadically throughout the arbitration proceeding so that he can continue to run his company, and I just want to make sure that's [135] okay with the Panel.

ARBITRATOR ZIMMERMAN: We have no problem with that. It's up to you, the way you want to handle it.

MR. BROWN: Thank you.

(Lunch recess)

ARBITRATOR ZIMMERMAN: Okay. It's 2:00 o'clock, just about. We're back on the record.

The arbitrators, at your request, have considered the motion in limine. As to the evidentiary use of trademark orders, it's the ruling of the arbitrators that the order previously issued by the court of January 25, 2001, with paragraph five that says that "Plaintiffs have stipulated that the only trade secret being claimed by plaintiffs in their action is the overall structure, architecture, and design of its computer system as a whole and not any individual process, formula, pattern, device, or compilation of information or other matter," we will follow the Court's order, and we will hold the plaintiff to its burden of structure, architecture, and design.

Needless to say, as we proceed in the case, defendants will have an opportunity to – to object as plaintiffs put on evidence. It seems to [136] the Panel that the – the word "structure, architecture, and design" may have different meaning to different parties; and we will just have to decide those issues as we proceed.

As to the issue of damages in this case, our ruling will be that we are confronted with the following kind of problem: Until we hear evidence on the matter, we are mindful of the objections that have been made. But until we hear the evidence, we're not quite sure what to do with the evidence, from the defendants' perspective of limitation.

As an example, if the expert has described an apple to be a fruit that has an orange cover that you peel, and you obtain the fruit essence inside that is citrus in nature and it is liquefied, one could believe that there's a cred – a credibility or weight to the evidence problem of what she

might testify to if she has difficulty deciphering between an apple and an orange; but whether or not it's excludable as evidence where she describes an orange but calls it – calls it an apple, we are reluctant to go down that path at this time.

So, we will have to see whether she describes an orange by calling it an apple but fully describes the orange so that the plaintiff may [137] present that evidence to the Panel for our consideration.

As to the issue of supplemental evidence served last week, we have a ruling and a question. We are troubled by the proposition that the defendants seem to assert that the individual with them that looked at the evidence that was submitted as to exactly when this evidence was submitted.

As we understand the issue, the information was that of the defendants. The plaintiffs have been trying to gather that information. In an effort to gather the information which was ten years old, or thereabouts, the plaintiff had to engage programmers to actually read this information because the current software apparently wasn't necessarily available to do that. So, there had to be some adjustments made in – in having the ability to have the key to read the information that was in the defendants' possession.

It was not as a result of the plaintiffs' lack of trying to get the information. It was just the way as – among other things, this case has developed, in a manner that is not necessarily conducive to – to readily displaying information.

Accordingly, it seems to us that the key

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[198] issue of exclusion of Webster and Brockman. As to Webster, the motion is denied. We would state that as to Webster, we believe that the plaintiffs have a considerable burden in light of the statements in Dr. Webster's report as to the royalty computations made. We will hold her to the standards and the statements that are in there. We're not going to – we have concern that her position may have changed from her original report to the supplemental report; and she is going to be permitted to testify, but our at-the-lunch-break statements still hold, but we just want to kind of give you some advanced indications that we do have concern about what we've heard regarding this maneuverability of what defendants have suggested is really not only a shift in position but is a shift in position without real basis behind it. But we're going to have to let the evidence move us where the evidence moves us in that direction.

On Mr. Brockman, we're going to deny the motion to foreclose him from testifying. In saying that, however, we are mindful and we expect the defendants to keep us vigilant as to not permitting him to stray from the limited area that he may hold expertise testimony – and we emphasize may hold – [199] and that would be the – the underlying creation of the – the software system and system issues. He will have to testify about that on his own.

Certainly areas of psychology, legal opinions, motivation, and intent of people, is not a relevant inquiry, nor should Mr. Allen and his trial team solicit that from Mr. Brockman.

We're also mindful that at page 11, paragraph 23 of the defendants' motion to exclude Brockman, it says,

"Indeed, Mr. Brockman freely concedes that he is not even qualified to offer an opinion on what is a trade secret and what is not, yet that is exactly what Mr. Brockman attempts to do throughout his report For example, at page 40 of his report, Mr. Brockman offers several conclusions about the existence of a UCS trade secret. Mr. Brockman's report presents unnecessary and unhelpful factual assertions, improper legal conclusion, and speculation regarding the subjective intent and knowledge of DSI personnel, and opinions on issues which he admittedly is not qualified to offer expert testimony."

Again, we just put you to your burden of proof being mindful that we believe that that's a proper objection and that you should not stray from [200] it.

The issue of – of the Panel reaching this conclusion will prolong this arbitration is not well taken. You have ten days to present your case. It – at the end of ten days, we stop. You all both told us that time –

ARBITRATOR SOUSSAN: Seven and a half.

ARBITRATOR ZIMMERMAN: Seven and half days, yeah.

– that time is not really going to be a relevant factor. I assume, though, that that may have been made without the defendant – or with the defendant believing that they were going to keep Mr. Brockman from testifying. But now that we have moved into this direction, you-all better start watching the clock and let us know where we are.

The Panel also wants to come forward and state that as to the computer on CARMan, we can basically see that the next issue is, is that since Mr. Brockman has now been, quote/unquote, qualified as an expert to testify, that

they want the computer turned over to Mr. Brockman to review.

Assuming that that could be coming from Mr. Allen, we would urge him not to make such a [201] motion but rather to use his Tulane expert to avail himself of a review of CARMan; and for that Tulane expert, should there be a need to – to go into that issue, that she would be the appropriate person to testify in that regard should you elect to go down that – that avenue.

Anything else?

MR. HARRISON: Not on any of those rulings on the Panel.

But when you announced your ruling with respect to our motion in limine concerning the May 9 order, if I heard correctly – and what I'm asking for is a restatement of that ruling because, if I heard correctly, you referred to the January order and the stipulation concerning what the trade secret is in stating your ruling; but you did not address the May order, which contains the same stipulation, but also which contains the statement concerning the evidentiary limitation. And I wanted to be sure that we had a ruling on both of those points. I may have not identified the appropriate orders correctly or accurately enough for you.

The January order is in there; and in paragraph 5, it contains the same stipulation as the later May order. But it's the May order that has [202] the evidentiary limitation, and I don't believe that the Panel ruled with respect to the limitation but only with respect to what trade secret plaintiff would be able to claim has been misappropriated in this case.

ARBITRATOR ZIMMERMAN: So there is no confusion, we are going to follow the Court's order.

MR. HARRISON: Thank you. The May 9 order?

ARBITRATOR ZIMMERMAN: Yes.

Well, just as a clarification to that, because we – the Panel discussed this at length at lunch, we are following all of the Court orders as best we can. There – each order, because of the way it is written, has certain language interpretations that are going to necessarily fall upon us in the course of this arbitration; and I think that the statements that the Panel made to you after lunch covers both the May 9th as well as the – the earlier order of January 25th, 2001, paragraph 5. And where it says in the May 9th that the "Plaintiffs' evidence identifying, describing the claimed secret shall be limited to their interrogatory response served on February 21, 2001, [203] which plaintiffs have stipulated are a complete description of their claimed trade secret," I think that we heard Mr. Allen state that within the area of – of structure, architect, and design, that's where they will limit themselves; but there is going to be some issue on the – we perceive, on what is structure, what is architect, and what is design. And we're all going to do the best we can shepherding all of us through that issue.

So, I don't – we don't, as a Panel, mean to be unresponsive to your request, but we can only do the best we can until we get into the evidence, by giving you some forward thinking on it.

MR. HARRISON: Thank you.

MR. ALLEN: In terms of preparing my witness in accordance with your orders, I made the argument to

the Panel that we do have other claims that relate to things that may not rise to the level of trade secret, and there may be things that we would want to elicit regarding evidence as to how they went about doing that and I – I am – I would respectfully submit that we could go into that as long as we're still within the confines of the – of the definition of our trade secret.

ARBITRATOR ZIMMERMAN: Well, I don't [204] want to answer your question yes or no because you are a very intelligent lawyer; and I am concerned that an answer of yes or no could be misconstrued. I think that you are going to present your case in the manner that you feel appropriate. I know that Mr. Harrison, et al, will object and lead us to the course that hopefully will do just, right, and equity to everybody. So, I – we will decline to answer your question, as proffered.

MR. ALLEN: Thank you.

ARBITRATOR ZIMMERMAN: And we also remind you that some of this may be subject to – to alteration based upon the copyright issue that we left you with homework on after the – after the lunch break because, depending upon what the copyright issue – how that fleshes out, that may also potentially limit some of the testimony that we hear.

You know, and let me say this, too: This Panel apologizes to all of you fine professionals. These are all very hard, complicated issues. We wish it wasn't that way. We wish as a Panel we were smarter and more intelligent and could lead – could shepherd this more authoritatively and – and more firmly than our rulings may suggest; but very [205] honestly, we are struggling with all of you to – to find the avenue. And until we hear some evidence, some of this

just may not flesh out the way each of you had hoped; but hopefully as we progress, it will start getting some – some body parts to it that we can all identify.

Okay. Let us go forward with our opening statement, or whatever you would like to do, Mr. Allen.

MR. ALLEN: May it please the Panel. The lifeblood of UCS's software has been misappropriated by these defendants. The lifeblood of UCS's success, and terrific success, has been misappropriated by these defendants. Bob Brockman's life work has been 37 years in this business building this system, building these companies, and developing a software system that has been able to carve a niche in a marketplace that is dominated by two publicly traded Fortune 500 companies: Reynolds & Reynolds and ADP.

Now, the Panel may be clear on this, but out of an abundance of caution, I want to be sure we all understand the structure of the parties. UCS is a group of companies that Bob Brockman founded – he founded the original company in 1970, and the

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[238] have incorporated or misappropriated anything that ADP has that would constitute a foundation for any kind of claim.

The one remarkable fact that I think that you're going to hear over and over in this case – and I'll be finished – the one remarkable fact that I think that you're going to hear is that not once did Bond McCall or John Oates discuss the license agreement with anybody from ADP, DSI, BSI, or any of these people that were looking at our system. Not once did anybody from BSI or DSI ask

whether or not there was a license agreement or whether or not they should be looking at our system or looking at our manuals. Not once did this come up, even though these computer people that are developing these products should know of the existence of license agreements. And you'll hear some of these people admit that they are familiar with them and that purpose of these restrictions is to limit access.

The project manager in this case, Mr. Mosely, will tell you, "I didn't know that Kevin McKenzie was hooked up to the system, but it's all right if he was. I didn't know if they were looking at the manuals, but it's all right if they were. I didn't know if they were examining the system with [239] the users, but it's okay if they did that."

At the very least, it is an unsupervised effort to create a competitive dealer management system that the individual members and participants exceeded all of their bounds and – and the agreements between the parties that resulted in the misappropriation.

Thank you.

ARBITRATOR ZIMMERMAN: Mr. Allen, was there an affirmative defense pled of copyright before Judge McCorkle?

MR. ALLEN: No, sir, not to my knowledge.

ARBITRATOR ZIMMERMAN: Copyright was first interjected into this in the course of the arbitration?

MR. ALLEN: The copyright was interjected into it on the last day that we could amend our pleadings, by them, Judge.

ARBITRATOR ZIMMERMAN: Okay. I think that we will – unless there is some point that you feel just needs to be made before we break, we're kind of inclined to break at five to 5:00.

MR. HARRISON: I'd like to provide the Court – or the Panel an accurate answer to that [240] question about what was pled before the Court before the case was transferred.

ARBITRATOR ZIMMERMAN: Would you?

MR. HARRISON: And were just going to have to check the history of the pleadings. I think that UCS is on their sixth or seventh amended complaint, and I know that we had several amended answers; and so, we will provide that in the morning.

ARBITRATOR ZIMMERMAN: Thank you.

ARBITRATOR MCGOWAN: Was there any – just curious. Was there any discussion on – in transcript form with McCorkle about – leading up to this order that sort of amplifies the order at all about what the parties had in mind? The order submitting it to arbitration.

MR. HARRISON: There was a – a hearing on May 31st before Judge Bianchi that was transcribed –

ARBITRATOR ZIMMERMAN: In his role as Special Master?

MR. HARRISON: As Special Master.

– and there was a hearing on the objection to the June – the earlier June order, but I don't think that there was a transcript of the proceeding after Judge Bianchi presented the order to Judge McCorkle and he entered it. On the

objections that were made subsequent to that, I don't think there was a transcript.

ARBITRATOR MCGOWAN: The order I'm talking about is the order of referral to arbitration.

ARBITRATOR SOUSSAN: Yeah, the Agreed Order.

MR. HARRISON: That – the referral to arbitration was discussed in the July 2001, hearing, at the same time as the June 15 order. The fact of, you know, whether we are going to agree to go to arbitration, and so on, was discussed at that hearing.

I think there is probably something in the transcript of that hearing about it, but I don't know that – that it will elucidate, you know, the form of the order or that sort of thing. We can copy it and provide you those transcripts.

ARBITRATOR ZIMMERMAN: And the reason –

MR. HARRISON: I just don't know if the arbitration order was really discussed.

ARBITRATOR ZIMMERMAN: And the

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[257] called UCS and spoke to Mr. Brockman and said, "What is this lawsuit about? Tell us. We don't want to buy a company that has misappropriated something of yours."

And Mr. Brockman said, "I can't tell you. I won't tell you. All I can tell you is that you plowed up a snake." And then for four-and-a-half years he refused to describe that snake.

And now we're in a situation where we can show that they cannot prove that they have a trade secret. They can't even describe their trade secret.

They say that the architecture, structure, and design of their system as a whole is a trade secret; and for an hour yesterday, we waited to find out what that means and how they're going to describe it, especially with the February 21st evidence that they have; and we didn't hear anything about it.

You can go through all of Mr. Brockman's notebooks that he says are going to lead us to the revelation of what the trade secret is, and you don't find a copy of the February 21st interrogatory answers. You don't find a description of the architecture of the system otherwise. All you find [258] is a lot of documents that Mr. Brockman believes show that Dealer Solutions' or Business Solutions' developers looked at parts of the UCS system in their development.

Now, focusing on what this case is about and what the evidence is supposed to be, we talked yesterday about how we got to this point with regard to the May 9 order and the evidentiary limitation; and I want to refer to that because that puts – sets the context for what architecture is and how one might go about proving it.

If we could just put up the May 9 order.

As we discussed yesterday, here is – here is the framework that Judge McCorkle has said this case should be tried within. He has ordered that the only trade secret being claimed by plaintiffs in their action is the overall structure, architecture, and design of their computer system as a whole, and importantly not any individual

process, formula, pattern, device, or compilation of information or other matter.

Now, again, the – the presentation yesterday by UCS's counsel held up pictures of screens, held up snippets of data fields. That is, by the order, not a trade secret. These individual [259] pieces of the UCS system are again, by order, not a trade secret. They also are by common sense, by the fact that they're, many of them, common features or functions of any dealer management system, and they're also not because they've been widely demonstrated by UCS to their prospective customers. And I'll talk about that a little bit more.

But what UCS has to show is that their system as a whole, the architecture of their system as a whole, is somehow a trade secret. To do that, first they have to describe it. And that's where the next paragraph of part 6 of the order comes into play, where the Court said that their evidence shall be limited to the February 21st, 2001, interrogatory answers, which plaintiffs have stipulated are a complete description of their claimed trade secret.

Now, at the – at the hearing, or one of the hearings, leading up to these moments, Mr. Allen for UCS said – and this is what Mr. Bianchi – Judge Bianchi accepted, "We have done our best. If we haven't identified it, let the arbitrators decide that there is no trade secret, either on summary judgment or at trial."

And that's the first issue that should be decided and should be dispositive of the plaintiffs' [260] claims here.

If the arbitrators decide there is no trade secret, either in summary judgment or at trial, it's the end of the case, because without a trade secret, all of the plaintiffs'

claims based on their trade secret, and all of them are based on this trade secret, fail.

Now, how should one go about identifying and describing this trade secret, this architecture, design, and structure of their computer system as a whole? Well, the Court gave very clear guidance in that regard, also.

Leading up to this order, the Court had – had instructed UCS as to how to describe this trade secret; and I think that framework is also helpful for considering the evidence in the case.

The June 15 order, that preceded this one, set out in very specific terms what UCS ought to do. And they said, "If plaintiffs claim that the overall structure, architecture, and design of its computer system as a whole is a trade secret misappropriated by defendants, plaintiffs shall specifically identify such system as a trade secret, describe with sufficient particularity how its combination of identified trade secret and nontrade secret [261] characteristics, features, functionalities, and components interact and work together and are adapted, implemented, integrated, and applied to form a whole unified process, design, and operation which is unique and secret in combination and which separates it from the general knowledge of those involved in automobile dealership management, and specific knowledge of those skilled in automobile dealership management systems."

Now, that's a mouthful; but what the Court was saying – and the Court sure didn't make this up. This language comes from the case law about how computer software trade secrets should be identified. What the Court was saying was, you know: Don't give me a jumble of user screen names, don't give me a partial listing of data

fields, but describe for me how your computer system's elements are combined and work together and are integrated to form a whole unified process, design, and operation.

Now, after that order was – approximately probably a year later was when the Court finally addressed – the February 21st interrogatory answers. And the Court knew that UCS had not come close to complying with the June 15 order; and so, that's why the Court said, "Fine. If this is your best, then [262] it's what you get."

And the evidence is the case is that with the February 21st, interrogatory answers, UCS cannot describe what it claims is its overall structure, architecture, and design of its system as a whole.

Now, yesterday I provided the Panel copies of these interrogatory answers. I hope that you still have them there somewhere in front of you.

ARBITRATOR ZIMMERMAN: We do. Is this it here?

MR. HARRISON: Yes.

If you look at the February 21st answers, what you have here are three sets of information. The first 29 pages of these answers list the names of data fields that can be found in the UCS system, and they list 489 data field names. The next 20 pages, beginning, I believe, at page 30, begins their list of names of their user screens; and they list 340 user screen names, going on for 20 pages here.

Now, data fields and user screens – just very briefly, a data field is simply the blank in the screen in which data is input. So, if you pull up a repair order, for example,

there will be a blank for customer name. There will be a blank for [263] customer address. There will be a blank for part number. And data fields are those things that identify what sort of information is going to be input into the computer and shown on the user screen.

User screens are, of course, what you look at when you are operating the computer and the software system; and so, a screen will come up that allows for entry of a repair order or entry of information concerning the sale of a product or inquiry about parts on hand and inventory. It's simply what you see when you operate the computer system, what the user interfaces with.

Those are what we have described in these answers.

And then finally, at the last five pages, UCS listed the names only of over 100 of the reports that the UCS system can generate, accounting reports, inventory reports, payroll reports, things of that nature.

None of – none of this information does what the June 15th order should – said should done in identifying and describing the structure, architecture, and design of the computer system as a whole. Again, it's a listing of parts. It's a – [264] it's a partial listing of components of a software system. It doesn't describe architecture because architecture relates to the functionalities of a system, how its components interact, and how those functionalities are integrated to form some kind of unified computer software system; that is to say, the accounting module will be integrated and interfaced with the sales module. And there is a way that a computer software program does that. The payroll system will be integrated and interfaced with the accounting system, and there is a way that

software – many ways that software can be designed to do that. None of that is described here. Some of that might be a trade secret in the UCS system.

The "how" it does these things, that's what architecture includes; and none of that is in UCS's evidence, whether you go through all of these notebooks or whether you look at the February 21st answers.

So, again, what we'll come to at the end of the day is a finding that these pieces and parts don't describe the architecture of any software system.

In a minute I'll describe and give you some pictures of what we think the UCS architecture

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[552] ARBITRATOR ZIMMERMAN: Okay. Yeah.

MR. HARRISON: I think now we're getting to a very crucial point in the evidence, and that is whether or not this evidence extraneous to the February 21st interrogatory answers is being offered as proof of a trade secret or whether it's just being offered for miscellaneous purposes to describe UCS's computer functions or things of that nature.

But it's at this point that we would ask that – where documents describing UCS's system are going to be offered or referenced, that the purpose of that offered or referenced, that the purpose of that offer be delineated, because the February 21st interrogatory answers make no reference whatsoever to the UCS manuals.

MR. ALLEN: The Answers to Interrogatories; Number 1, do refer to data fields and screens and screen numbers, as is set forth in the manuals. We're offering

these documents as a comparison to show to the – to the requirements definition to show that the overall structure, architecture, and design of the – of the UCS system has been misappropriated.

The Answers to Interrogatories, as we have been over, time and time again, outlines basically [553] three categories of information. It outlines what Mr. Brockman had at the time, a comparison of the data structures of UCS and CARMan, the DSI product. And it falls into three categories; data fields, screens, and reports.

These document are our reports, our manuals that we supply with our product, will also contain references to screens, data fields, and reports, and it will demonstrate the – the overall structure and design, I would submit to you, has been misappropriated and has been included in the requirements definition.

That's why Mr. Brockman has taken such care to look at these.

MR. HARRISON: But that is specifically what Judge McCorkle has said is not admissible evidence with regard to this architecture, structure, and design. These manuals are not described in this list of 489 data fields and 345 screen names. And this is going to become well beyond, well outside the scope of the evidence that the Panel has already ruled would be followed and that Judge McCorkle very clearly stated should be followed if Mr. Allen, as he is saying right now, is going to start offering eight or ten user manuals [554] as evidence of the structure and design and architecture of their so-called trade secret.

Those same manuals were offered and rejected by the court in an earlier order that said, "That won't do to submit a bunch of manuals . You have to tell us what your evidence of this is."

And when they came back with these lists in the February 21st answers, the court said, "That is it."

And now we see them trying to back-door this case. We've seen it all along. We've already gotten the Panel's ruling on it.

ARBITRATOR ZIMMERMAN: Okay.

MR. HARRISON: This is their evidence.

ARBITRATOR ZIMMERMAN: How do you respond to that?

MR. ALLEN: Judge, the documents that we produced – well, let me – two, let me back up one step.

The documents that we produced in response to previous discovery requests, or in response to motions to dismiss, consisted of four boxes of documents that outlined the total functionality of the system. It – it outlined every reflex. It [555] outlined every detail about what we claimed was the misappropriated trade secret. And, frankly, I have those here and –and would be happy to show them to you. It consists of about 12,000 pages of documents that – in four boxes.

It underlines, I would submit, Judge, our good-faith efforts to define the trade secret before Judge Bianchi.

It was at that point in time when they filed another motion to dismiss for sanctions that we did, as best we could, outlined what we had to date from the CARMan

data structure, the screens and data fields and reports that we claim constitute the misappropriation of – of the keel of the – of the UCS system.

These documents confirm or go to how they misappropriated that. It's evidence as to how – what it was that they did that – that constituted the misappropriation, and confirms that they misappropriated the overall structure, architecture, and design of the system.

ARBITRATOR ZIMMERMAN: Okay. Permit me to ask this question

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: I think I [556] hear Mr. Harrison saying that you are limited in your proffer to only those matters which are on the list that he is holding that is the supplement to your answers to the interrogatories.

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: Do you agree that that is what you are limited to, as a concept?

MR. ALLEN: Only as to the identity, Judge, of the trade secret. And we have identified that, and I think that's what the order says. But the proof of what they misappropriated and how they did that, I don't – I do not think that I'm limited to any evidence to that, Judge.

In fact, I think it would be – I think this is key evidence that the Panel needs to see to see what it is that they did. This is how they misappropriated our system.

ARBITRATOR ZIMMERMAN: And did you relate that in your answer to interrogatory, that there are

eight volumes, or whatever it is, of documents that the plaintiff – that the defendant is permitted to view at your office that includes the – this information?

MR. ALLEN: Well, we had already produced these documents, have since produced them, [557] Judge, and have marked them as exhibits.

ARBITRATOR ZIMMERMAN: But did you include those documents in that answer?

MR. ALLEN: These particular manuals, the information that is in Version 3 of these manuals would be in the boxes that we produced previously, Judge.

ARBITRATOR ZIMMERMAN: And were those recited in your answer to interrogatory?

MR. ALLEN: Yes, sir, I think that the – that the pieces of that information are recited in the answer to interrogatories, It's not page by page because, basically, Judge, what Judge Bianchi told us to do was you can't just produce the pages from the manuals and identify the trade secret. You have to tell us exactly the identity of that, and that's what we did in the last set of interrogatories.

But that does not – the identity of that trade secret, Judge, which is what Judge Bianchi was telling us to define, does not prevent us, and the order does not say that it prevents us, from offering evidence as to how they misappropriated it.

ARBITRATOR ZIMMERMAN: Okay.

MR. HARRISON: Well, evidence as to [558] how they misappropriated something allegedly would be something different; and that's why I am looking for very

clear clarification as to what is an obvious attempt to back-door evidence into this case where Mr. Allen just said that this is what describes our architecture.

Mr. Brockman has testified that he needs the manuals to describe the system architecture, that it's not done in these answers. And the court has said these are the answers. This is the evidence. That's why their case fails at the first element.

And now we see them trying to do what the court has said they can't do. They tried to submit volumes of manuals and say the trade secret is in there; and Judge Bianchi specifically said, "You cannot do that. You cannot submit manuals as your description of your trade secret."

And when they tried it, he sanctioned them again; and finally, they're left with these answers. Now, this is the key point in this case that we've been watching and waiting to see; and now it's happening. They're trying to back-door evidence of the description of the architecture of their system that they've never provided and that they can't [559] provide by these answers by starting to talk about these manuals.

Now, if it's limited for how they misappropriated what's in here and we get back to whether what is in here is the architecture of their system, then maybe; but that's – has to be very clear. And we will be, I'm sorry to say, all over it because that's where we got after two-and-a-half years of fighting with these people to find out what their case is about.

ARBITRATOR ZIMMERMAN: Okay.

Your response?

MR. ALLEN: As the order provides, Judge, plaintiffs' evidence identifying and describing their claimed trade secret, those documents – the Answers to Interrogatories set out all the UCS reports, the – the information, the documents that are printed out from the UCS system. They outlined the UCS screens that are contained in the UCS system and that are in the manuals. It sets forth the data fields in the answers to interrogatories, the ones that we had identified to that date.

You may remember that I have identified some other ones because they produced the electronic [560] data structure just a couple of months ago. But that's in Section 35, of Mr. Brockman's report.

These manuals show that there has been – how they misappropriated what they did in terms of the overall structure, architecture, and design of the system.

And that order – the order – Judge Bianchi's order doesn't – doesn't prohibit me from offering that evidence. What he was trying to do, and I think that's all the order says, is identify the trade secret. I think he was –I know he was satisfied, because he – he lifted the stay and denied all their motions.

And they said, Your identify – your – your trade secret and the identity of that trade secret is the overall structure and design of the system.

And we're – we're sticking to that. But we have to be able to show the evidence about how they did that and what they did in connection with that misappropriation, and this is evidence of that.

ARBITRATOR ZIMMERMAN: Okay, I think we understand the problem. We're going to take a morning

break, and the Panel will discuss the – the issue before us. Fifteen minutes.

[561] (A recess was taken.)

ARBITRATOR ZIMMERMAN: The Panel, prior to the lunch break, conferred several times with counsel over procedural issue for the duration of this case as it relates to the supplemental interrogatory response, of the interrogatories that was filed in this matter dated February 21, 2001.

A review of the order of June the 15th, 2000, and specifically paragraph 3, and review of the December – excuse me – the May 9th, 2002, order, specifically paragraph 6, that states, in pertinent part, "Plaintiffs have stipulated that the only trade secret being claimed by plaintiffs in their action is the overall structure, architecture, and design of their computer system as a whole and not any individual process, formula, pattern, device, or compilation of information or other matter. Plaintiffs' evidence identifying and describing their claimed trade secret shall be limited to their interrogatory responses served on February 21, 2001, which plaintiffs have stipulated are a complete description of their claimed trade secret."

Basically, we were somewhat greeted with, although not actually verbalized, it kind of seemed [562] to us a request to almost consider anew the motion for summary judgment on this issue, which we are – we took into account all of the matters that were discussed.

What we would like to do in this regard – and this is just one more example of the difficulty that all of us are greeted with in this case – and – and somewhat tongue in

cheek, Judge Soussan and I were kind of musing to ourselves, we wish that we could have had some cases – we had some cases that we wish we could have pushed off to arbitration from time to time, and we kind of understand perhaps why this case was pushed to arbitration, because there are some difficulties with it. I takes a lot of time to go through all of these things.

We think that – understanding that we have got a lot of time ahead of us to do the various things that are there, and understanding that contract is still an issue in this case, as well as trade secret, unless trade secret is somehow preempted and/or subsumed within the copyright issues that we still continue to dodge and twist and weave on, which we will hear some more about over the next couple of days, we think it's appropriate to continue with this arbitration, that the – that [563] the plaintiff should be mindful of, which plaintiff counsel represented he was, in our – in our session, that the supplemental response to interrogatories are what he's going to rise and fall on in this case.

We think that it is appropriate, although not mandated by this Panel, to first address clearly, and with evidence, what your trade secret is. Let us know what each and every one of these trade secrets are, recognizing that you have stipulated that it's not so much little individual things but it's the overall structure, as you said in your –in your May order, the overall structure, architecture, and design, and give you – give you leave to continue to – to put your case on, to show us that, and then to show us what violations you contend were made in the trade secret arena.

But understanding, we keep looking at this 50-plus page document as your road map of – of where you're going and what you're limited to. You're not supposed to make other stops in other cities that are not geographically set out on this document. And, you know, we want to give you leave to put the kind of case on that you think is appropriate for you to put on, notwithstanding [564] protestations that come from very worthy defendant advocates in this matter.

But there certainly may be some – some land traps and land mines along the way because of the way this is written. We're not saying there are, but we read in the motions for summary judgment, and the responses, some of the – the underlying documents from the – Judge Bianchi, and motions that were filed with Judge Bianchi and the state district judge, Judge McCorkle, that causes us to have perhaps a little higher antenna volume than we might normally have.

So, we do want you to proceed, try to proceed as expeditiously as possible; and, you know, we will just see where that takes us.

And at the end of the presentation of your case, you know, we just have to consider, if any motions are filed by the other side, that – whether you call it directed verdict or almost renewed summary judgment in concept, what it all means at that point. But, you know, clearly, this is a land mine field area.

MR. ALLEN: And do I understand your order, Judge, that it forecloses me offering evidence as to how the trade secret or trade secrets [565] were misappropriated?

ARBITRATOR ZIMMERMAN: No.

MR. ALLEN: Or it does not –

ARBITRATOR ZIMMERMAN: No, it does not foreclose you from doing that.

MR. ALLEN: And nor does it foreclose me from putting on evidence as to the damages?

ARBITRATOR ZIMMERMAN: No, it does not foreclose you from putting on evidence as to damages.

MR. ALLEN: So, what we're focused on now is the identification of the trade secret?

ARBITRATOR ZIMMERMAN: We would – we would appreciate if you could –if it doesn't totally disrupt your stream, to do it in that manner so we really identify clearly and precisely what your trade secret is so that when we hear evidence of alleged violation of trade secret, it will have already been in the evidence that this is your trade secret.

And we would hope that your proffer in chambers earlier will bear out in evidence; which is, you're only going to put forward those matters that are contained within your 53-plus page [566] supplemental response to interrogatories.

MR. ALLEN: Yes, sir.

And along those same lines, just to be sure that I'm straight on the Court's ruling, it was my plan from just – from visiting with you-all earlier that I would start with the Answers to Interrogatories and work to the cost estimate, the requirements document, and to those limited portions of our manuals that are referenced or that are identified as the screens in the requirements document.

ARBITRATOR ZIMMERMAN: Well, we don't want to tell you how to put your case on. We only want to say that we would like to know what the trade secrets are –

MR. ALLEN: Okay.

ARBITRATOR ZIMMERMAN: – and then, since a trade secret case is made up of misappropriation of trade secrets, or alleged misappropriation, we'd like to understand what those are.

How you go from, "Here are our trade secrets" to "Here are misappropriations" to "Here are damages," and contract also within all of that, breach of confidentiality, that's what your genius [557] has created and that's why you're the lawyer of that case.

MR. ALLEN: Well, I only asked that question so that I was on the right path, Judge. I just don't want to start to go off on something that I didn't understand that you were telling me that I couldn't offer. So, I'll go forward. I'm ready.

ARBITRATOR ZIMMERMAN: Okay. Well, I'm not sure that I said yes to everything you said in terms of how you were going to do it, because I don't want to prerule on those issues without the other side's input; and I don't want the other side's input until we hear evidence and where we're going.

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: So, let's kind of all proceed in good faith, understanding there are going to be bumps in the road.

MR. ALLEN: Then, at this time, I've got Mr. Brockman on the stand; and I am going – I am going – Yeah, okay. And I am going to start from the Answers to Interrogatories.

You know, it would seem to me, Judge, that they should be marked as an exhibit, because I don't think that they have been marked as an exhibit by

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[588] fields that are on those screens and all the functionalities that are within those programs.

ARBITRATOR ZIMMERMAN: Okay.

THE WITNESS: That's all part of the – the architecture.

ARBITRATOR ZIMMERMAN: Okay. That's your theory. Okay. I understand. I mean, I –

MR. HOWARD: I just have to get on the record.

That is not the entire system. That is one application within their entire system, and that is not their – their trade secret. He – and he's said in deposition many times before, he's not qualified to say what a trade secret is.

But we know that the finance and insurance application – we could have copied the code for the finance and insurance application, and that would not be a violation of their trade secret. That is not a trade secret.

One part of the finance and insurance application is not a trade secret. The entire application of the finance and insurance application is not a trade secret. Their entire system, architecture, design, and structure, is the only trade secret. So, I – I disagree with his [589]

statement that he's even trying to say that it's a trade secret. It is not. The Court has ruled it is not.

ARBITRATOR ZIMMERMAN: We hear what you're saying, and also the answer he just gave me may be inconsistent with the answer he gave you in his deposition, because he answered yes, that taking all of these together is his architecture, is his trade secret, which sounds to me, in variance to what you just said, because you said he said he didn't know what the trade secret was; so, I mean, we just – we're going to ferret it out.

MR. HOWARD Well, actually, what I'm saying is what he just said is inconsistent with the Court's order as to what his trade secret is. His finance and insurance application is not the overall architecture, structure, and design of his system, which the Court has ordered is his only trade secret. The Court specifically mentions that no single application or function or screen or collection of those things can be a trade secret.

ARBITRATOR ZIMMERMAN: Okay. Let me ask you this: If we were to stip – if the other – could we get a stipulation that his – what – if we were to permit him to testify for the next two days, [590] he's going to take us through all these blue – blue manuals and all of these things, and at the end of the day, Mr. Allen is going to stand up and say, "Arbitrators, each and every one of these items taken together is the whole system, is the architecture, is whatever it is, and that's the trade secret," if – if we were to stipulate that that's what he's going to say, then can we just decide this thing on the arguments of the – of the law at that point?

MR. HOWARD: Well, I think you could, because that – all of that, what he's about to say, related to what

makes up his trade secret, all the narrative commentary he's about to give, is not admissible as to what the trade secret is.

If he wanted to give a lengthy, descriptive narrative about what his trade secret is, it needed to be in the interrogatory. That's what Judge Bianchi said in the earlier order. "I want a detailed description of the functionality that you claim is your trade secret, how it interacts with nontrade secret information," which he's just said some of the data items aren't. So, he needed to provide this description, in detail, in narrative format, just like he's going to want to do [591] over the next two days, in response to the order. That's exactly what he needed to do.

ARBITRATOR ZIMMERMAN: Okay. But those are kind of two different issues. We are here. We're going to take evidence. We've made that – we've made that ruling.

My question is: Would you be prepared to stipulate that all of these things that are listed – his position is, "When all of these things listed are taken together, they are a – an architect – architecture, a system, which constitute his trade secret"? That's his position.

MR. HOWARD: In that – no. Just the data elements and the functions that he is going to talk about, no, that is not, because what these manuals don't show you is the program structure, the interrelationship between the different modules. There is a lot more to architecture, structure, and design than what he is going to show.

What he's going to show you are little bits and pieces, data elements, or screen names; and he's going to want to stay that that – they misappropriated those, and that's our structure, architecture, design; and it's not.

ARBITRATOR ZIMMERMAN: Okay. So, at

* * *

[608] we are granted a running objection to all of this evidence as being outside the scope of the interrogatory responses?

ARBITRATOR ZIMMERMAN: Even though running objections are probably not appropriate, I mean, I don't mind saying that you have a running objection that these matters are outside of the – Exhibit Number 283, I think, the – answers to interrog – Supplemental Answers to Interrogatories. Is that what you said?

MR. HOWARD: Yeah.

MR. HARRISON: 284.

ARBITRATOR ZIMMERMAN: 284, yeah.

I will give you that running objection, and we will carry that running objection until we get to motions.

ARBITRATOR SOUSSAN: I just want a clarification, though. You're saying it's outside the scope of the Supplemental Answers to Interrogatories because it is a far more detailed description?

MR. HOWARD: Yes, they were – that is the evidence that they have to describe their trade secret. As you remember from the previous order that you pointed out in our earlier meeting, [609] that the Court said to the plaintiffs, "You need to describe, in particularity, with

particularity, the interaction between the functions of the trade secret, the nontrade secrets." They will – the Court wanted a nice narrative description of their trade secret and all of those particulars that he addressed in his order.

They didn't do it in the interrogatory response. And the Court said, "Okay. You didn't do what I asked for, but I'm going to let you go and I'm going to limit you to this."

Now we're getting the narrative. Now we're getting the description of all the functions that the Court said, "I want you to put in your answer. I want you to describe your trade secret in that fashion." Now they're trying to do it. That is additional evidence of their trade secret that is outside the interrogatory responses.

ARBITRATOR SOUSSAN: What is your response to that?

MR. ALLEN: Judge, the correlation of what they took from the cost estimate to the manual is what we claim that they've misappropriated; and that's why it's outlined in this document like it is.

[610] This is – I would submit to you, Judge, puts us back three years. This is the same argument that they used every time I went over and talked to Judge Bianchi. Every time.

And what we hear now is the same argument, based upon the same things; and Judge Bianchi, who went through that for three years, two years, said that this was a sufficient description.

Now it's time, I would submit, as tedious as it may be, unless we can figure out an alternative, it's time to hear

the evidence on that and see if it satisfies the requirement of trade secret.

ARBITRATOR SOUSSAN: Where did Judge Bianchi say that this is a sufficient description?

MR. ALLEN: He denied all the motions and lifted the stay, Judge.

ARBITRATOR SOUSSAN: As far as going forward with the evidence for the afternoon, it was my understanding that we were going to try to focus on description of the trade secret; and as we spoke of in the conference room with the chicken and egg analogy, I don't understand why it's necessary to – to code anything back to DSI or BSI's requirements [611] document in order to describe their trade secret. They should be limited to their interrogatory responses.

And if we're allowing them latitude to somehow tie their manual into that, the document that existed at the time their trade secret was created, so be it; but I – what he's doing is trying to show the misappropriation his step, which is the back-door that all this extraneous information is coming in.

And I thought in order to stop that, or to focus our issue, we were just going to describe the trade secret, which doesn't require using my document at all because it doesn't describe their trade secret.

MR. ALLEN: That's the whole issue, does it describe our trade secret? I would submit to you, Judge, that it does. And the starting part for that is the obvious cross-references that are in the document itself.

ARBITRATOR ZIMMERMAN: All the objections are carried. Let's proceed.

MR. ALLEN: Thank you, Judge.

Q. (By Mr. Allen) Bob, let's try to be expeditious; but let's go step-by-step for the time

* * *

[644] is, in this, that the program that you're looking at on page 210, the Report Print Format –

ARBITRATOR ZIMMERMAN: Right.

THE WITNESS: – that's actually a control program. It's not a report. And so, therefore, it doesn't appear in the report section, yet it is part of the – the PIC section in the CARMan requirements definition.

And it's actually referred to in the development estimate on page 918. It's the second item down from the top on page 918.

ARBITRATOR ZIMMERMAN: Of what?

THE WITNESS: In the cost development – in the Development Cost Estimate.

ARBITRATOR MCGOWAN: Section 14?

ARBITRATOR SOUSSAN: 918?

ARBITRATOR ZIMMERMAN: I don't know what 918 –

THE WITNESS: It's 16918, is the Bates number in the development estimate.

If you look on the top, it's the second item.

ARBITRATOR ZIMMERMAN: I see. Under "Report."

THE WITNESS: Yeah. It's not –

[645] it's not a report in itself. It is a program which governs the format of a report.

ARBITRATOR ZIMMERMAN: Okay.

Format.

THE WITNESS: Therefore, it's listed in the program section.

ARBITRATOR ZIMMERMAN: I see. Okay.

Q. (By Mr. Allen) As it relates, Bob, to the reports or parts of reports listed on – listed on page 53, beginning with Activity Report and through the 40-45 Obsolescence Worksheet, are those reports that are listed in the Cost Estimate?

A. Yes, they are.

Q. Can you track each of those reports to the 5 requirements definition?

A. Yes, I can.

Q. And can you track each of those reports that are in the requirements definition to the UCS manuals?

A. Yes, I can.

ARBITRATOR ZIMMERMAN: Okay. We accept that proffer.

Q. (By Mr. Allen) Were those reports that were available to Sterling McCall?

A. Yes, they were.

[646] Q. Let's go ahead and see if we can finish up the reports here, Bob.

Maybe –

MR. ALLEN: Your Honor, could we take a break? It would probably do us some good to kind of help him track these reports back. That's as far as we could get over lunch. We thought we might – we thought it would probably take us all afternoon to read the other stuff into evidence.

ARBITRATOR ZIMMERMAN: I figured it would have taken you longer than that.

MR. ALLEN: Perhaps.

ARBITRATOR ZIMMERMAN: Why don't we reconvene at 4:00 o'clock.

THE WITNESS: Thank you.

(A recess was taken.)

MR. ALLEN: Judge, since you have kind of shifted my burden of proof, Mr. Brockman hasn't been able to correlate all the reports back to the requirements document to date; and we – since you're talking about the proof of the identification of a trade secret, I would like to have an opportunity to kind of marshal my evidence, so to speak, to do that. I'd request that we break for the day and give me an opportunity to do that [647] and start up tomorrow.

MR. HARRISON: That's fine. We're not going to insist that we get –

ARBITRATOR ZIMMERMAN: Except with him.

MR. LEWIS: No.

MR. HARRISON: – that we put on a witness that isn't here.

ARBITRATOR ZIMMERMAN: That's okay. We would like to leave you with yet one more question and challenge.

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: And that is, looking at the June 15th order, paragraph 3, if you could also speak to us tomorrow about the eternal question of whether your Supplemental Answers to Interrogatories comply with section 3 – or number 3 of that June 15th order, and specifically when it says describe in detail with specificity – because, you know, we, the Panel, have heard that argument. We did it in chambers. We discussed it – and how – how you think you have responded to that.

MR. ALLEN: Sure. Yes, sir.

ARBITRATOR ZIMMERMAN: Do you want to add anything else to it?

[648] Because we all know you have filed it. We all know that you think it complies with the May order. And the question is whether it also complies with the June 15th order. And – because we don't know of any reason why the June 15th order is still not part of the orders of the Court. Because I think you-all agreed that it was when we talked to you-all earlier.

MR. ALLEN: Well, I think that you have to consider those orders in context, Judge, because the

response that I made that is here was made in response to that order.

Now, that was before Judge Bianchi when he issued the May 9 order. Actually, there was an order before the May 9 order; but the – the governing order. The order that's in place that you're concerned about here today, this – this had been done.

ARBITRATOR SOUSSAN: What do you mean, this had been done?

MR. ALLEN: These Answers to Interrogatories has been filed, Your Honor.

ARBITRATOR ZIMMERMAN: That's dated February –

MR. ALLEN: Yes.

[649] MR. MCGOWAN: You're saying that the February 21 interrogatories were done in response – was it the June order?

ARBITRATOR SOUSSAN: The June 15. Right.

MR. HARRISON: Yes, sir.

ARBITRATOR ZIMMERMAN: And then the May order comes along; and you're basically saying, "We accept your answer, and you will be held to that proof"?

MR. ALLEN: Yes, sir, that is what I'm saying. I don't think that the provisions of the June 15 order really apply to this response because this response was made en route – in response to that order; and after this filing was made, Judge Bianchi did what he did in the order. He lifted the stay and denied their motions.

ARBITRATOR ZIMMERMAN: Okay. Now, we saw some material that was responsive, you know, motions and responses on motions.

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: And – where you had suggested, you know, that this has been urged four different times by the defendants and, you know, kind of enough is enough kind of thing –

[650] MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: – but yet you're greeted with it one more time times five; so, there is never enough is enough on this issue.

Okay. Well, that – you know, that's part of our concern.

And you're going to refer us to your response, Mr. Harrison, that talks about mootness or something?

MR. HARRISON: No. I just wanted to know: There was the June 15th, 2001, order.

ARBITRATOR ZIMMERMAN: Yes. With paragraph 3.

MR. HARRISON: And it says you contend – paragraph 3.

ARBITRATOR ZIMMERMAN: Right.

MR. HARRISON: There was another interrogatory answer that followed that, not the February answers.

And then Judge Bianchi ordered – entered the January 25th, 2001, order that you have.

ARBITRATOR SOUSSAN: January 25th?

MR. HARRISON: And he said that they still hadn't complied with the June 15 order and ordered them to do it again. And –

[651] ARBITRATOR ZIMMERMAN: And then he files the February 21?

MR. HARRISON: And then the February 21st answer followed the January 25th order.

ARBITRATOR ZIMMERMAN: Correct.

ARBITRATOR SOUSSAN: Okay. And did you object to that supplemental response?

MR. HARRISON: Yes. Then we filed our second motion to dismiss.

ARBITRATOR SOUSSAN: Okay. And that is the motion that was denied?

ARBITRATOR ZIMMERMAN: Yes.

MR. ALLEN: Yes.

MR. HARRISON: That was the motion that – where we're asking to dismiss the case. That was the order that was denied by – the motion that was denied by the May 9 order where the lesser sanction was then imposed.

ARBITRATOR ZIMMERMAN: Right I mean, we follow that history.

MR. HARRISON: Yeah.

ARBITRATOR ZIMMERMAN: I guess the real issue is whether or not the June 15th order, paragraph 3, is superseded by the May 10th order, paragraph 6.

[652] ARBITRATOR MCGOWAN: May 9 order, paragraph 6.

ARBITRATOR ZIMMERMAN: May 9 order, paragraph 6.

MR. ALLEN: I don't see how it can't be, Judge.

ARBITRATOR ZIMMERMAN: I'm just asking the question. I mean, I hear your – you're now saying it is superseded –

MR. ALLEN: Yeah.

ARBITRATOR ZIMMERMAN: – and I think I had heard Harrison at one point say it's not superseded, and we're trying to – trying to pick through that issue.

MR. HOWARD: And I do believe it was.

ARBITRATOR SOUSSAN: Okay. Just a quick question.

After the February 21 interrogatory was filed, you filed a motion to compel again, or motion to dismiss, based on what?

MR. HARRISON: Pardon?

ARBITRATOR SOUSSAN: After he filed his supplemental –

MR. HARRISON: Yes.

[653] ARBITRATOR SOUSSAN: – that we're talking about all day today –

MR. HARRISON: Right.

ARBITRATOR SOUSSAN: – you filed a motion to dismiss, right?

MR. HARRISON: Yes, a second motion to dismiss.

ARBITRATOR SOUSSAN: Based on what? Was it based on the same reasoning as before?

MR. HARRISON: Yes, that this listing did not comply with the June 15 order.

ARBITRATOR SOUSSAN: Okay. And that was denied?

MR. HARRISON: Well, in part. The case was not thrown out.

MR. ALLEN: Well, it wasn't denied in part. It says denied. Their Motion for Sanctions were denied.

MR. HARRISON: Well, you can – you can read the order, and we all know what it says.

ARBITRATOR SOUSSAN: Well, it says, "The motion to dismiss for discovery abuse is denied."

MR. HARRISON: Right.

MR. ALLEN: That's what it was. It [654] was directed at my answers to interrogatories that said, for the fifth time, that my responses were insufficient; and that was what was denied.

ARBITRATOR ZIMMERMAN: For the first time through this, Mr. Harrison has said something that caused me to chuckle. He's so calm about everything and so professional about what he does. And in his usual grace

and style, he says, you know, "We can all read the order. We know what it says."

Well –

MR. HOWARD: Apparently we don't.

ARBITRATOR ZIMMERMAN: – apparently we – we're all having trouble, or at least three of us are having trouble reading the order.

MR. HARRISON: Well, the simple point is that, yes, the – the motion to dismiss their case for discovery abuse was denied; and the lesser sanction that's set forth in the paragraph that we're all here about was imposed.

I don't remember whether or not, in our second motion to dismiss we said, "If you're not going to dismiss, limit them now to this." We will check and see.

ARBITRATOR ZIMMERMAN: Well, any – we will – we are going along.

[655] MR. ALLEN: Well, to be a little more accurate – and this order is included in this – in this response, the first – after I filed these amended Answers to Interr atories, Judge Bianchi – Judge McCorkle – Judge Bianchi submitted an order, and Judge McCorkle signed it, that said that, "Plaintiffs' evidence in support of its claim that its automobile dealership management software system is a trade secret shall be limited to its proof set forth in its responses and supplemental responses to interrogatories submitted to defendants prior to September 1, 2001.

ARBITRATOR ZIMMERMAN: And he's –

MR. ALLEN: I'm sorry.

ARBITRATOR ZIMMERMAN: No. I'm sorry.

MR. ALLEN: What that order said – this is – this is after I filed this.

ARBITRATOR ZIMMERMAN: Yes, we understand.

MR. ALLEN: And what this order said, basically, was – this is what I was arguing before, Judge. This order said I get to rely on all of my prior responses, including the boxes of documents that I had submitted in response to the – [656] to the previous Answers to Interrogatories. That's what they all got bent out of shape about and said, "Allen's going to try to claim that there is some other trade secret that's mixed in with all that stuff previously."

So, that's when they went back and said, "We need for you to clarify that, Judge." That was what I objected to.

And we went back, and we clarified it. And that's when Judge Bianchi said, at their request, that it's limited to the Answers to Interrogatories.

The point is, is that in the – in the order – the two orders after I filed these Answers to Interrogatories, Judge Bianchi did not dismiss our case on their motion for discovery abuse.

ARBITRATOR SOUSSAN: May I please see a copy of the motion that was filed after the September – no – February 21 supplemental interrogatories so I can see –

MR. HARRISON: Yes.

ARBITRATOR SOUSSAN: – what motion was denied?

MR. HARRISON: Yes.

ARBITRATOR SOUSSAN: Because I want [657] to see that motion that the orders say was denied.

MR. HARRISON: Sure.

ARBITRATOR SOUSSAN: Okay? That's the motion I would like to see.

MR. HARRISON: That would be our second motion to dismiss.

ARBITRATOR SOUSSAN: Right. I guess so.

MR. HARRISON: Now let me respond to what Mr. Allen just said. And I hate to be going through this. We have already decided that what – what he just said is wrong.

But –

MR. ALLEN: That's not true.

MR. HARRISON: – but the May 9 order, we didn't go back to Judge Bianchi and say, "They're going to try and change their trade secret thing." They had already stipulated, it's the architecture of the system as a whole. That was in order since before the May 9 order.

What we went back to him and said is, "Wait a minute. You've referenced all this prior discovery, and that puts us right back where we started three years ago, because they've got these 12,000 pages of manuals that they want to use to say [658] this is our trade secret."

And Judge Bianchi agreed and said that their evidence would be limited to their last answers, not all their answers. He realized that in saying "previous discovery,"

he was encompassing this raft of unintelligible documents. And so, that's why he narrowed it down and said, "It will be the February 21 answers, which they stipulated are a complete description of the trade secret."

ARBITRATOR SOUSSAN: Right. Okay.

MR. ALLEN: And so, to add to that, Judge, Panel, that's exactly what I was arguing to you-all before. They said they've got – you're letting him use all of his answers that he's given before –

ARBITRATOR SOUSSAN: I understand.

MR. ALLEN: – so we want you to narrow – we want you to narrow down the identity of the trade secret.

MR. HARRISON: No, it was –

MR. ALLEN: – and not limiting any other proof I mean, that's what the order says. I mean –

ARBITRATOR SOUSSAN: Well, we can read the order.

[659] MR. ALLEN: I invite you to read the motion.

ARBITRATOR SOUSSAN: We can read the order. If you can just give me a copy of your motion.

MR. HARRISON: The second motion to dismiss. We will get it.

ARBITRATOR SOUSSAN: Yeah.

MR. HOWARD: Going back to your initial question, I think paragraph 3 –

ARBITRATOR SOUSSAN: Uh-huh.

MR. HOWARD: – it was not superseded or overruled. In the May 9 order, Judge Bianchi was simply saying, "Okay, Mr. Allen. If you're telling me this is the best you can do in complying with this paragraph, I am going to take you at your word. It's not time I am changing my order or saying you can do something different. You've told me that this is your best response to this paragraph 3, and I am going to take you at your word, and I am going to say, Okay. You've done the best you can in this interrogatory response, but now you're stuck with it."

And that's where he references that he partially denied the order. And he didn't give the [660] death penalty sanction of dismissal, but he gave the limiting of the evidence. And it is not just for the identity. It's the limiting of the evidence they can use to describe their trade secret.

ARBITRATOR ZIMMERMAN: Okay. Well, that's what we talked about in chambers.

MR. HOWARD: Yes.

MR. ALLEN: Thank you.

ARBITRATOR ZIMMERMAN: All right. Well, we will break for the day and look forward to another peaceful tomorrow.

MR. ALLEN: Thank you, Judge.

[661] STATE OF TEXAS)

COUNTY OF HARRIS)

I, Kathy Miller, a certified shorthand reporter, hereby certify that the foregoing transcript was given before me.

I further certify that I prepared this transcript and that the foregoing pages constitute a complete and correct copy of the transcript of the proceedings.

I further certify that I am not related to or employed by any of the parties hereto, or their counsel, and that I am not in any way interested in the outcome of this matter.

Certified to by me this ___ day of ___, 2003.

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My certificate expires December 31, 2004.

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[663] ARBITRATION HEARING, taken in the above styled and numbered cause on the Day of June, 2003, from 9:11 am. to 5:00 p.m., before Kathy Miller, Certified Shorthand Reporter No. 739 in and for the State of Texas, at the offices of Nell McCallum & Associates, Inc., 5300 Memorial, Suite 600, Houston, Texas.

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[666] ARBITRATOR ZIMMERMAN: Good morning, everybody. Okay. Would the – it's a little bit after 9:00. It's Thursday. The case still has not settled. So we're still in arbitration.

Okay. What – I think there was some homework over the evening hour. But where does everybody rest?

MR. HARRISON: We have a couple of things, I think, that were requested by the Panel.

ARBITRATOR MCGOWAN: Can we get this door shut back there, please? Thank you.

MR. HARRISON: I can think of three. Hopefully, those three won't prevent us from moving forward today. But Judge Soussan had asked for a copy of the motion to – the second motion to dismiss, which I have, and I have copies for all of you, but I thought maybe given its volume that handing off one would suffice. I have a copy for the parties, if they want another copy, but, of course, that was served before.

Now, that is the second motion to dismiss that led to the December – I think December 10 order that then we

sought clarification with respect to. And so the May 9 order was actually ruling on our motion for clarification, that followed the [667] second motion to dismiss. And so I brought a copy of the motion for clarification, also. This was filed March 2nd – I'm sorry, March 12th, 2002, and then the May 9 order followed it.

I just – out of interest, I'd note that what we said in the motion for clarification was it is important that the scope of this limitation, referring to the evidentiary limitation, be made clear to allow the parties and the arbitration Panel, which will be unfamiliar with the history of this discovery dispute, to know the scope of the evidence UCS may be permitted to offer, so that they may try this matter, or resolve it on summary judgment. So, more than a year ago, we were addressing the concern now that we're struggling with.

The other thing to note with respect to the motion for clarification is that, in the motion at page 12, we propose the language that Judge Bianchi and Judge McCorkle should incorporate into the clarification order, and the language we proposed here is quoted in the May 9th order.

ARBITRATOR ZIMMERMAN: Which is the paragraph six?

MR. HARRISON: Yes. It was adopted [668] verbatim from our proposal here.

The second matter that I know is on the table was the question of whether or not the state trial court would be bound to follow the state law authority of Butler, or any state law authority with respect to the preemption issue that we're addressing. We've got a brief and a presentation prepared with respect to that.

And then the third item that I know was on the table was your inquiry as to whether or not the interrogatory answers would satisfy paragraph 3 of the June 15th order.

So those are the two other things that I know were part of the overnight homework.

ARBITRATOR ZIMMERMAN: What's your conclusion on the June 15th issue?

MR. HARRISON: Well, it's, of course, our position that the interrogatory answers would not satisfy the June 15 order, because if you read what it requires with regard to descriptions of integration, combination of the features and functionalities to form a unified system, that is separate from the knowledge of those in the industry and so on. Again, the interrogatory answers are a fractional description of certain pieces of the UCS [669] system, which we don't think would satisfy that requirement.

Now, that language, not to go on and on about this, but that language was not created out of the clause by Judge Bianchi and Judge McCorkle. That language was adopted from the case authority that we had provided concerning the requirement in summary judgment cases that trade secret – specifically computer software trade secret, be specifically described as part of the trade secrets case.

ARBITRATOR ZIMMERMAN: We're mindful of that.

MR. HARRISON: And then I'm sure Mr. Allen will want to respond, but we also have the issue of the state court, whether it's bound by the state court authority with regard to preemption.

ARBITRATOR ZIMMERMAN: Is there anything different in your conclusion other than what, A, was said to us yesterday; and, B, what's contained in the brief that you filed with us?

MR. HARRISON: No, I think that the brief really addresses it fairly succinctly.

ARBITRATOR ZIMMERMAN: I don't mean this brief, I mean the previous brief where you [670] refer to that same issue, and quoted Texas law, a 1940 case, I believe, or something.

MR. HARRISON: Well, the case we cited in that brief was really with regard to whether the Panel has jurisdiction that the trial court might not, by way of an agreement. And that case was pre Texas General Arbitration Act, but it was the only one that we could find. And there it said that where the amount in controversy, and the arbitration exceeded the trial court's authority, or jurisdiction, that the trial court couldn't enter a judgment on it.

I don't know that that's on point, or even binding authority now that the Texas General Arbitration Act has been enacted after that case.

So, frankly, we don't – we don't have authority that we can find that addresses this specific issue. There's no question that the Agreed Order would constitute a Rule 11 agreement. The question really is whether or not the federal Copyright Act cause of action is encompassed or contemplated by it.

What we address in this brief though, Judge Zimmerman, is the question of whether or not, you know, where you've got federal law preempting

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[669] flexibility, or give me and my client the flexibility of changing the theory of what the trade secret was. And they, in fact, recite in there, in the motion, that they cited, that they filed, even if it were allowed, meaning UCS, allowed to re-open the door to its claims, that individual features or components of its software are trade secrets, UCS's response, again, completely ignores the requirements of the June 15, 2000 order.

Now, that's exactly what my argument has been with respect to the order. They were making – they were taking the position that they were worried about us changing the theory of the trade secret, back to the individual components of the system, rather than the overall structure, architecture, and design of the system. That was their position in the motion. That's their position on – in the motion for clarification.

I don't think they requested that there be limitations on the evidence of the trade secret, it's just that it be limited to structure, architecture, and design. And I would respectfully submit that when you read these orders in that context, when you read these motions in that context, I think that becomes crystal clear.

[700] ARBITRATOR ZIMMERMAN: Permit me to ask a question of that. And, again, I thank you for your – the Panel thanks you for your analysis on that.

MR. ALLEN: Sure.

ARBITRATOR ZIMMERMAN: More specifically, our question has a slightly different twist to it, that we posed yesterday, and that is, do we – and, again, you know, I am going to ask you, and you're going to have one

answer, and we ask the other side, and they have another answer, but so be it. That's life in our arbitration.

The specific question was: In the June 15th order, does paragraph 3, where it – it has amplification language for what you are to set forth in your supplemental answers, does that language engraft itself into the May 9th order, paragraph 6, is which it is a lesser descriptive statement? It uses the word "describe" in the May 9th order, but in the June 15th order – paragraph 6 – but in the June 15th order, paragraph 3, it seems to go about defining what the word "describe" means. And that was the question we really had posed to both of you.

MR. ALLEN: And the answer to that, maybe I didn't make myself clear, but the answer to [701] that, Judge, is I would say that it is not, because that's what they were asking for in the motion.

ARBITRATOR ZIMMERMAN: Okay.

MR. ALLEN: And they asked for that repeatedly.

ARBITRATOR ZIMMERMAN: Okay.

MR. ALLEN: And like I say, they refer to paragraph 3 of the June 15th order eight different times that I counted reviewing this document this morning. Judge Bianchi didn't buy that.

ARBITRATOR ZIMMERMAN: Okay. Thank you.

MR. ALLEN: As a framework, I would respectfully submit, as a framework, I'm going to put Mr. Brockman back on the stand, and we're going to continue

to talk about the answers to interrogatories, and the identification of the trade secret.

ARBITRATOR ZIMMERMAN: Before he does that, let Mr. Harrison respond to that question, and then we will proceed.

MR. ALLEN: I'm sorry.

MR. HARRISON: We have really begun to beat this dead horse quite a bit, and so I'll be [702] very brief.

ARBITRATOR ZIMMERMAN: Begun?

MR. HARRISON: We've been beating this dead horse quite a bit. But in –

ARBITRATOR ZIMMERMAN: But it's a horse that doesn't die. It's kind of like the horse with no name.

MR. HARRISON: It may not die twice. We were very clear in the motion, and where we proposed the specific language that Judge Bianchi and Judge McCorkle adopted in paragraph 23, beginning at page 11 of the motion for clarification, we said that, the court must limit UCS's claim to a system as a whole, as the court expressly held in its January 25th, 2001 order, a finding incorporated into the December 10 order, the one we are seeking to get further clarification on.

And then we said, additionally, paragraph 7, which is the equivalent to 6 in the prior order –

ARBITRATOR ZIMMERMAN: Correct.

MR. HARRISON: – must limit UCS's proof of its alleged trade secret to its February 21 responses because all prior responses were held to be inadequate, in prior

orders. Another finding [703] expressly incorporated into the December 10 order.

And then we said that they should modify paragraph 7 of the December 10 order as we set out, and our proposed language was adopted verbatim.

So, you know, Mr. Allen can keep saying all this was about just getting them to say that their trade secret was their system as a whole, but its two parts. And, you know, we can keep standing up and saying that, but as I suggested yesterday, we can also read the order.

Mr. Allen says that the motion for clarification wasn't even about sanctions. Well, it was for clarification of the sanction set forth in the December 10 order, which also limited their evidence, but didn't do it clearly.

With respect to the June 15 order language, that order is left alive expressly by the May 9 order, not in paragraph 6, but in paragraph 7, which says, except to the extent that paragraph 6 changes the prior orders, which was the clarification of the prior paragraph 7, all prior orders remained in effect.

So, it's there. It's certainly guidance as to what the Panel should be looking for with regard to this description that now we're trying.

[704] ARBITRATOR ZIMMERMAN: Okay.

MR. HOWARD: Just briefly, Judge, I think the simple answer for your question is, yes, that language is engrafted into the last order. In the first order he said, here's how you need to describe it. This is the way that you need to go about describing your trade secret.

In the last order, instead of dismissing, he said, okay, you're telling me this is the best job you can do to describe it in accordance with my order, so this is all you're going to be limited to, to do that, to describe it.

So, yes, he's using the word "describe" to refer back to his earlier order saying, this is how you should have done it, this is how you're telling me you did it, and complied with my earlier order. So that's it.

ARBITRATOR ZIMMERMAN: Okay. Thank you. All right Your witness.

MR. ALLEN: Thank you, Judge.

Mr. Brockman needs to get his manual. Just take two minutes.

ARBITRATOR ZIMMERMAN: Which manual are we going to start with now?

THE WITNESS: PIC.

[705] MR. ALLEN: PIC.

CONTINUED EXAMINATION

BY MR. ALLEN:

Q. Bob, I want to start this morning by drawing your attention to Section 14 of your report, that's been previously admitted into evidence, which is the CARMan development estimate. Do you have that in front of you?

A. Yes, I do.

Q. Now, as it relates to – throughout those pages, Bates numbers 16914 through 16928, approximately 14

pages of lists, do you see the cross-references there that cross-reference UCS screens?

A. Yes, I do.

Q. And obviously, they're not random numbers. I mean, there are – for example, if you go to the – the desking portion, it starts at 222, and then it goes to 222-1, 222-2, 222-3. What – what is – from a programming, or development standpoint, Bob, what is the significance of – of an outline of the UCS screens in – in a document like this?

A. What this describes, this describes how the programs are laid out specifically in this area, which is referred to as desking, deal window. It's [706] a finance and insurance system. It shows the breakdown of the programs inside that system, that are going to provide the various functionalities.

It – it illustrates how the data fields that are involved in a car deal are broken into individual screens so that like related information will be contained on a given screen.

Q. Is – does it show a sequence, or a flow?

A. Yes, it does. Its a – a logical relationship of subscreens underneath the main screen, which is 222 – 222-1 and dash 2, dash 3, they're all subscreens underneath the main master deal screen.

Q. From a programming or development standpoint, what, if anything, does a – does a list like this tell you about the structure or architecture or design of a computer system?

A. Well, it describes how a – a system for the – the calculation of the financing of car deals, how one works, how one that is successfully working in the field today, you know, doing business in car dealerships, you know, how you would break down those functions logically.

MR. HOWARD: I am going to need to object for today's objection that this is now

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[735] the data structure of that screen, is that part of the structure, design, and architecture of the UCS system?

A. It is.

Q. And do you take measures to protect that?

A. Yes, I do.

Q. And does that give value to the system?

A. Yes, it does.

Q. Let's go and let's pick another, if you would, Bob, another screen, and let's talk about, from the answers to interrogatories, Exhibit 284. What screen are you going to refer to now, Bob?

A. This is the accounting detailed record. It's the individual debit and credit screen.

Q. Now, is it included in the answers to interrogatories?

A. Yes, it is.

Q. And tell us the – what this screen – the importance of this screen, or program.

A. Can I refer everyone to tab 35.7?

Q. Tell us what 328 does, please, Bob. And for the Panel's clarification, tell us – tell us how this – how this program is numbered and why. How you can see it on there.

A. This program is numbered program 328, [736] right here.

Q. And those program numbers, Bob, where do they come from?

A. They're assigned as part of the overall architecture, structure, and design of the UCS system. The 300 series programs, the low 300 series programs are all accounting programs. They begin with 301, and I think they go up through 338, 337, 338.

Q. All right. And tell us –

MR. LEWIS: May I ask a question at this point? Is there a revised 35.7, or is this the old 35.7?

MR. ALLEN: So that – so that that is clear, remember, Mr. Brockman gave you, several weeks ago, a whole section of 35 that he said should be taken out and put back in?

MR. LEWIS: I am looking at it, and I don't– I don't find a 35.7 in that, I don't think

ARBITRATOR ZIMMERMAN: We have it in ours. Maybe it just didn't make it into your notebook.

MR. LEWIS: Well, I kept a notebook separate for this very purpose. Maybe it's in here [737] and not the tab.

MR. HARRISON: Could we just ask, what is in the 35.7, so we can reference?

ARBITRATOR MCGOWAN: Yeah.

MR. ALLEN: It is going to be the same things that's in all the other tabs with the same type of description and comparison. It is just going to be unique to that particular screen.

MR. BROWN: Here you go, Bob. It's in the supplement.

MR. LEWIS: May have just missed the tab for it. I don't have a tab. I don't want to hold this up. They gave me a copy, so I'm okay.

MR. HARRISON: Could we just note, once again, for notation and carry, I expect that the screen pictures, the descriptions of the relationships between these data fields and so on, are not included in the interrogatory answers of February 21.

ARBITRATOR ZIMMERMAN: Thank you. We will so note. We will carry it.

MR. ALLEN: Thank you, Your Honor.

ARBITRATOR ZIMMERMAN: And consider that as part – in our decision.

MR. ALLEN: Just out of an abundance [738] of caution, all of this stuff was produced, Judge. I think his, objection is simply that it doesn't have a picture of the screen in the answers to interrogatories.

ARBITRATOR ZIMMERMAN: No, that's not really merely– we understand it was all produced. That's not the issue.

MR. ALLEN: Okay.

ARBITRATOR ZIMMERMAN: The issue is whether or not you really do comply with June 15th, section 3, of the answer to interrogatory.

MR. ALLEN: Understood. Okay.

Q. (By Mr. Allen) Bob, tell us what 328 does.

A. 328 is the accounting detailed debit and credit entry of which there's anywhere from tens of thousands to hundreds of thousands of these records existing inside the system.

Q. And what is the importance of keeping track of all of these records?

A. These are the records of the financial transactions that the dealership has made.

Q. And is that a – is that a complicated or unique part of the business?

A. It is.

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[767] and the date and the time and the station of the person that's created that record always appears. And this is a – a part of what's also at issue in this case, is the contents of the Sterling McCall backup tapes, which will be looking at records of all different types, it will be looking for initials right here, and dates and times.

Q. Now, as it relates to these sequentially numbered screens, Bob, does that reflect how they work together?

A. Yes.

Q. And does it reflect – what would be the right word? An outline of the – of how they work together?

A. Yes, it does. The way they actually work from one to the other is, and that's that there's a – a single character field up here in the upper left-hand corner, which is called a function code, and if you're on the first screen and you want to go to the second screen, you just put a 2 in-there, hit the button, and you get the second screen. Or if you want to go to the third screen, you put a 3 and it comes to this one. If you're here and you want to go back to the first one, you just put a 1 and the first one comes back. That's how they integrate [768] and interface together.

Q. And is the information that's collected in these screens, Bob, is that from UCS's efforts over the years?

A. Yes, it is.

Q. Is it – is this confidential and proprietary and trade secret information?

A. Yes, it is.

Q. Does it constitute part of the overall structure and design?

MR. HOWARD: Right there, he just asked him, is there a trade secret.

ARBITRATOR ZIMMERMAN: Sustained. Sustained.

Q. (By Mr. Allen) Is this part of the trade secret of the overall structure and design of the system?

A. Yes, it is.

Q. Does it have value to UCS?

A. Yes, it does.

Q. And do you make efforts to protect its confidentiality?

A. Yes, we do.

Q. Let's go to another screen. Bob. Oh, I forgot something. Did you compare this program, or [769] programs, to the DSI data structure?

A. Yes. I found that on screen 1, there are 80 fields, 80 data items. I was able to find 72 of those data items, or 90 percent, in the CARMan data structure.

In screen 2, there's 51 data items. I was able to identify 39, or 76 and a half percent in the CARMan data structure.

And the third screen has eight fields on it, of which I was able to find 100 percent of those in the CARMan data structure.

Q. Bob, let me show you Exhibit 208 out of my Exhibit – out of our exhibit book. And I am going to remove it just to make it convenient. Have you – have you seen that document in connection with the preparation of – or the review of the DSI documents?

A. I think I may have, John.

Q. Is – is that this screen?

A. Well, it's actually all three screens.

Q. And – and where does that indicate that that document came from?

A. It says, DSI 020053.

Q. From looking at that document and the handwriting on it, can you tell – what would be [770] your observations, as a programmer and developer, as to what's being done there?

A. It would be my opinion that the – the development people inside Dealer Solutions are studying they screens to determine what their data field content is, to assist them in the design of the CARMan system.

MR. ALLEN: If I could, I'll just, rather than dig out all the books, maybe I could just hand it to the Panel and put it back in my exhibit book. Would that be permissible?

ARBITRATOR ZIMMERMAN: Yes.

MR. BROWN: John, could you identify the Bates number?

ARBITRATOR ZIMMERMAN: DSI 020053.

ARBITRATOR SOUSSAN: Whose handwriting is at the bottom of that?

MR. ALLEN: That's the way it was produced, Judge.

ARBITRATOR SOUSSAN: Oh, okay.

Q. (By Mr. Allen) Bob, what's the next screen you want to –

THE WITNESS: Hold on.

MR. ALLEN: I'm sorry.

ARBITRATOR MCGOWAN: Let me look at [771] it one more time.

MR. ALLEN: Sure.

ARBITRATOR MCGOWAN: Is there – I don't see a date on it.

MR. ALLEN: I don't know that there is one.

ARBITRATOR MCGOWAN: It is hard to read it, actually.

Q. (By Mr. Allen) Bob, what's the next screen that you would like to review?

A. It's program 142. It's back in the PIC manual. It's on page 47.

Q. Let me – let me take one step back, Bob. As we look at Exhibit 208 of our exhibits, can you tell by looking at that document who the client is?

A. Yes. It's Sterling McCall I –

Q. And how can you tell?

A. I can tell that because in the – it's a convention in the upper left-hand corner of this screen, the customer number always appears 158001 is the Sterling McCall customer number. It's seen in many, many, many documents in this case.

Q. And produced, according to the Bates number, by whom, Bob?

A. Dealer Solutions.

[772] Q. Okay. Let's go to the next screen, what's the next screen that you'd like to look at, Bob?

A. It's program 142, in the big blue binder. It's under tab 35.3.

Q. Now, tell us what program this is, Bob.

A. This is the special order record. It is a – call it a subapplication in the Parts Department. Its purpose is to automate what previously had been a manual system, and actually still in some dealerships is a manual system yet today.

Special ordering of parts is best described like this. When a – a car needs to be repaired, and the Parts Department doesn't have the part that's required, their first step, in essence, they'll contact other dealerships in the local area to see if they have the part and they can buy it from them, get it from them today so they can fix the car and get the customer back on the road.

Failing that, they will contact the lowest, or pardon me, the nearest factory warehouse to them, to see if they stock that part, and if perhaps they can get it overnight.

Failing that, they have to make a – what's known as a special order, which means that [773] the order will have to go to the factory warehouse, which, for domestic cars, is typically in Detroit. For imported cars, it will be on either the east coast or the west coast. Some cases, it may have to even go back to a factory that's across an ocean. And so, a special order may take weeks, sometimes even months to arrive.

And so, this particular process, when it's done manually, is kept track of with a little card file, which is subject to problems that all card files have. Cards get lost. People don't review the cards. Cards get misfiled, and so forth.

And so this is a computerized system that I designed a good many years ago to handle special orders.

Q. And what – what does it do to facilitate the operation of the dealership, Bob?

A. Well –

MR. HARRISON: Excuse me. We want to note our objection that the offered – about to be offered testimony concerning this program 142 exceeds the scope of the permissible evidence, if it's offered for purposes of establishing the alleged trade secret. And here's a good example, if I could just [774] take a moment. Page 38 of the interrogatory answers give us all of the information that we have, with respect to this screen, the picture of which has been presented here, and offered as evidence of we think, evidence of the alleged trade secret, part of it.

Page 38 lists PIC 142, SPO entry/change, and then the description provided is, "Place special 9 parts orders." To the extent that the evidence offered extends beyond that information and description, we object to it on the same basis that we've noted before.

MR. ALLEN: Just for clarification, that particular screen is noted on the bottom of page 21 that outlines what the different data fields are, in addition to being referenced in the other portion of the answers to interrogatories.

And so that everybody understands, we have long since produced all of the manuals on the UCS system for several years. In fact, from, I think, section 12 point through 20 point. And that means that those are yearly revisions. So, roughly eight years' worth of manuals that reflect and contain every year all of these screens and any revisions to those screens that might exist.

[775] ARBITRATOR ZIMMERMAN: It's noted. Objection is noted.

MR. HARRISON: If I could just respond to that, because that's a continuing refrain, that all of these manuals were produced is meaningless. Because the court ordered that the outside documents could not be part of the definition of the trade secret, so, yes, it's interesting that these manuals were produced, thousands of pages in dozens of boxes. But they're not in February 21 answers.

MR. ALLEN: All of which was produced pursuant to their request.

MR. HARRISON: Indeed. We've asked for hundreds and thousands of documents.

ARBITRATOR ZIMMERMAN: Excuse me. The issue is not what has been produced, because they're not questioning it was produced. The issue continues to be interpretation of the June 15th order, and the May 9th order, section 3, and section 6.

MR. ALLEN: In this particular case, judge, all of these are outlined, starting at page 21 of answers to interrogatories. It details the data fields or structure.

[776] MR. HARRISON: All it does is list data names like customer name and address. We know what's

in here. Again, we can read this. But we object to going beyond and talking about organization of these screens and programs, and organization of data fields.

ARBITRATOR ZIMMERMAN: Objection noted.

Q. (By Mr. Allen) Bob, coming back to program 142, is the layout, or the information that's contained in that, is that prepared, or done, by UCS over the years?

A. Yes. As I said, I designed the original version of this screen some number of years ago.

Q. And the collection of information that's – that's assembled there, is that for – done by UCS?

A. Yes, it is.

Q. Is it a part of the confidential and proprietary, and part of the structure and overall design and architecture of the UCS system?

A. Yes, it is.

Q. Do you make effort to keep it confidential, and secret?

A. Yes, I do.

[777] Q. And does it give value to the UCS system.

A. Yes. It's a very, you know, valuable part of the parts inventory package.

Q. Is – how does this give you – well, let me – let me – did you compare this program, or the data structure to the DSI data structure?

A. Yes, I did.

Q. And what did you find?

A. I found that there are 68 fields on the 142 program, and I could find 59 of those inside the CARMan data structure, or 86.8 percent I could – that I could identify.

Q. What – I am not sure I asked you this, Bob. How – how does this type of an application give UCS a competitive advantage?

A. Well, this application is really not used by our competitors, or certainly, historically, has not been. They may have something out today that addresses this particular application area, but whatever they have, it's not widely used in the marketplace; whereas, ours is used in a predominance of our customers, and our customers that – enjoy it a lot, and find it very useful in keeping track of special orders.

The reason why that's really important to [778] a – a parts department is, and that's that when a special order part is – is ordered, the dealership's bought it. Now, the problem is, that the customer doesn't always come back and get it. And certainly if they're not promptly followed up on, and continuously followed up on, they don't come back to get it.

And that's – the reason why that it is so important, if a dealership doesn't have an automated special orders system, they typically have a higher rate of parts obsolescence because they have bought these special order parts, customer never came to get them, and so, therefore, they had to write them off. They had to junk them.

Q. Bob, let's look at – let's look at another screen.

ARBITRATOR ZIMMERMAN: Is this an appropriate place to break?

MR. ALLEN: It would be, Judge. Sure.

ARBITRATOR ZIMMERMAN: We will take a lunch break.

(A lunch recess was taken.)

MR. ALLEN: Judge. I want – over the break, Mr. Brown had brought a different copy of

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[787] Another type of use would be, let's suppose that a dealership had a lease on a piece of property to park excess vehicle inventory, and there was an annual rental. Well, they would want to set up that rental so that it was accrued on a monthly basis, even though it's only paid annually. That way their monthly profit and loss statement would be more accurate. And they would set up those kind of entries in this particular system.

There's a – a further use of it, which has to do with the preparation of depreciation expenses. If you'll notice, in this screen, there is a – a field here called "Method." That stands for depreciation method, whether it's straight line, or sum-of-the-years digits, or double declining balance. The rate of depreciation, that's how much is supposed to be taken every month. And then what the scrap value is at the end where you depreciate 90 percent of the value, but you still have 10 percent scrap.

So, a dealership, if they do it by hand, they have to keep track of the depreciation of each depreciable asset, and make the entries for each depreciable asset. Using the standard entry system, it's possible to automate that

process. And so this [788] is a big timesaver, as far as the – the controller, or chief accounting person in a dealership.

Q. Does that – is the information that's collected on this screen, or assembled on this screen, is that the result of UCS's efforts over the years?

A. Yes, it is. This, again, was a screen which started with a lot fewer data items on it, but over the years it's been enhanced and enlarged with things like a note field. Originally we didn't have the note filed [sic]. And it was very convenient to note what this particular standard entry is all about, and how it is supposed to be handled and who authorized it.

Q. Is this program confidential and proprietary?

A. Yes, it is.

Q. Is it part of the structure and architecture and design of the UCS system?

MR. HARRISON: Excuse me. Again, we just need to note our objection that to the extent that this references information such as this screen picture, program 306-01, what it looks like, how the data is organized on it, this goes beyond the February 21st interrogatory responses, to the extent [789] that it's offered to describe the claimed trade secret.

MR. ALLEN: Every data item that's listed on this is listed in the answers to interrogatories.

ARBITRATOR ZIMMERMAN: We'll carry the objection.

Q. (By Mr. Allen) Is this – does this give UCS a competitive advantage, Bob?

A. Yes, it does. It is, in my belief, the best standard entry system in the industry today.

Q. And is it – does it provide value, or give value to the UCS computer system?

A. Yes, it does.

Q. Okay. Let's move onto the next screen, please, Bob. You know, let me back up. Did you compare this screen to the data structure, or the data elements of this screen to the data structure of the DSI system?

A. Yes, I did.

Q. And what conclusion did you reach regarding the comparison of the UCS data elements with DSI?

A. There are some 23 different data fields on this screen. There is actually more than that. If [790] you count the – the number of entries in this matrix, I was able, to identify 20 data fields in the CARMan data structure, 87 percent.

Q. Let's look at the next screen, Bob.

A. The next screen will be in the big blue book at 35.6. It will be in the MAC manual, page 316.

ARBITRATOR ZIMMERMAN: By the way, will each of you make a note that at the next break, if you-all could confer among yourselves and give us a single answer to the following question. In other words, we don't want to hear from you and from you and from you. We want a single answer, which is a yes or a no. So therefore, if one of you among you don't want a particular event to occur, the common answer from the group will be no. If all of you unanimously agree, then the answer will be yes. But we

don't want to how who said yes and who said no. And the question is: Would you object if the arbitrators, in our consideration, thought it would be helpful for us to talk to Judge Bianchi, as a group, regarding his orders? And we will not talk to Judge Bianchi unless the answer is unanimously yes.

Q. (By Mr. Allen) Tell us what screen this

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[827] on the dealership's balance sheet is, is vehicle inventories. And it is not surprising at all to see eight to $10 million worth of inventory in the new and used car inventories in a dealership of even fairly moderate size.

Q. Is the information that's collected and assembled on these – in these programs, has that been the product of UCS's efforts over the years?

A. Yes. I designed the original version of this system, which began with only about half of one screen of fields, some number of years ago, probably in the early '80s. It's been expanded over the years, to add on additional pieces of information to make it more useful, and keeping track of the investment that the dealership has in its inventory.

Q. Is this confidential and proprietary information of the company?

A. Yes, it is.

Q. And does it give value to the system?

A. Yes, it does. It's integrated, as I've mentioned earlier, to the finance and insurance system. It's also integrated into the accounting system. This screen, in particular, is integrated to the factory communications

systems, the factory communication systems feedback, and automatically [828] update this screen for some car manufacturers, not all of them.

Q. And does the company make an effort to keep this information from public disclosure?

A. Yes, it does.

Q. Does it give the company a competitive advantage, Bob?

A. Yes, it does. It's by far and away the most complete vehicle inventory system available.

Q. Did you compare the information on these screens, to the programs to the DSI data structure?

A. Yes. There's approximately 136 fields here.

MR. HARRISON: Excuse me.

THE WITNESS: Or types of fields.

ARBITRATOR ZIMMERMAN: Yes. Excuse me just a minute.

THE WITNESS: Excuse me.

MR. HARRISON: I want to object to the reference to data fields with respect to the vehicle inventory system because there is not a single vehicle inventory system data field listed in the February 21st interrogatory responses. So a description of these fields for purposes of trying to prove a trade secret, or in this case, even [829] misappropriation, goes beyond the scope of the May 9 order.

MR. ALLEN: These particular fields, and screens, Judge, are actually right out of the cost estimate off of the requirements document.

ARBITRATOR ZIMMERMAN: Well, aside from where it's off of, we're back to, you know, tracking this document as your road map. Can you show us where it is on the road map?

MR. ALLEN: In terms of the – the programs, Judge, it starts on page 33. And it has these vehicle inventory screens, one, three, and four, right about the middle of the page.

ARBITRATOR ZIMMERMAN: Uh-huh. Okay. We'll carry the objection.

MR. HARRISON: I just want to note the distinction between the screen names and the data fields that are being described by way of these pictures and about to be compared, not a single data field for the vehicle inventory system is listed in the interrogatory answers.

ARBITRATOR ZIMMERMAN: Wait. Do that again, please. I'm sorry.

MR. HARRISON: The distinction that is important here, is that, yes, screen names are [830] shown here.

ARBITRATOR ZIMMERMAN: Are shown here on 284 or 283?

MR. HARRISON: Yes, at page 33, but the screen description or content is not. And then when you get to the specifics of the collection of data fields, not a single data field from the vehicle inventory system is listed in these

interrogatories. We have this repeatedly throughout. The system has 30,000 data fields, and there are 489 listed in the interrogatory answers, none of which include anything related to the UCS vehicle inventory system.

MR. ALLEN: The short answer to that, Judge, is that, like I said earlier, these are the screens right out of the – right out of the requirements document. That's where we got this list. And that's the basis – that's the same testimony that Mr. Brockman went through yesterday, was that if you trace – if you trace the screen number, UCS screen number off the cost estimate, you find its contents, or a description of it in the text of the requirements document, and then retrace the requirements document back to the manual. All Mr. Harrison is saying, is that there is not a

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[859] obviously right now, and they have got nothing – well they got – yeah, they got a fair amount here. Might be a little questionable. But it – what this is used for, is – and that's that when you're – when you have to make a decision on whether to extend a little more credit, you've got to see just exactly, you know, how far they are deep into you, and what the trend has been. And this allows you to see a five-month trend of what's been happening in the various aging columns, whether they have been getting better or worse.

In the parts business, for – in the dealership world, it's particularly critical with body shops. Body shops have a tendency to buy lots of parts, they're high dollar purchasers, but they also tend to be shaky operations financially. They are forever getting strung out by insurance companies; they always have cash flow problems, and you

really got to keep an eye on body shops. But on the other hand, body shops buy lots of stuff because body shops are buying captive parts. They're buying bumpers and hoods and fenders and quarter panels and things like that that they can't buy anyplace else except at dealerships. So they're really valuable dealership customers, but they're [860] really tricky from a credit standpoint.

Q. Now, Bob, you – you were talking about pricing matrices, are those complicated calculations?

A. They're very, very complex.

Q. Is – is – are those – are those pricing matrices calculations, are they – are they instrumental in the financial success of your Parts Department?

A. Absolutely. If you can improve – improve your gross profit percentage by one percent, two percent, three percent a month, and you say you're selling, you know, a million dollars a month worth of parts and service, you know, one, two, three percent improvement, all that drops right straight at the bottom line. It could actually, in many cases, you know, double or even triple your net profit.

Q. I want to show you –

A. I –

Q. I'm sorry.

A. Excuse me.

Q. I want to show you what's been marked as Plaintiffs' Exhibit 217, Bob, and ask you if you have seen this document, in connection with your [861] review of the documents in this case?

A. Yes, I have.

Q. And who produced that document?

A. Dealer Solutions.

Q. And can you tell us what it is?

MR. LEWIS: Well, I'm going to object to that, again. This would now be his interpretation of what our document is. He has no expertise in this.

ARBITRATOR ZIMMERMAN: Well, I am not – let's not have him say – interpret it. Let's just identify what it is.

Q. (By Mr. Allen) Can you identify what it is?

A. Yes. What it is, it's a diagram of the UCS calc code and matrix pricing scheme.

Q. From a developers and/or programmer's standpoint would that diagram of the pricing matrix be useful?

A. Yes. It is basically a definition of exactly how the UCS calc code and matrix pricing system works.

Q. Does it show structure, Bob?

MR. HARRISON: Objection.

A. Yes, it does.

[862] MR. HARRISON: This goes outside of the – objection. This goes outside of the scope of the February 21st interrogatory answers.

ARBITRATOR SOUSSAN: What's your response?

MR. ALLEN: Frankly, this relates not necessarily to the structure of the system, but it's just evidence of I guess, what they were doing with it, more than anything. It just ties into the subject matter of these screens.

ARBITRATOR ZIMMERMAN: Objection sustained as to the last question.

Q. (By Mr. Allen) Would you like to see this? Bob, I am going to hand you Exhibit 2 – I'm sorry, I'm going to hand you Exhibit 31, please, Bob, and ask you if you can identify that document?

MR. HARRISON: Exhibit Number, please.

MR. ALLEN: 31.

Q. (By Mr. Allen) Can you identify what that is?

A. Yes, I can.

Q. And what is it?

A. It is a description of the – a further description of the UCS calc code and matrix pricing

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[1251] effort be in terms of testing?

A. Well, as of this date, Sterling McCall is – is on the UCS parts inventory system, and has been on it since 1984. Therefore, the two-and-a-half years worth of parts invoices could only have come from the UCS parts inventory system.

Now, why would one want to destroy all invoices and regenerate them? Well, there would be – this would be a – a very useful way to test the pricing calculations, the

discount calculations, the matrix pricing and the calc codes, to make sure that they all work the same.

If you could actually take two-and-a-half years worth of invoices, and rerun them again, and have everything come out with the same numbers, you would be assured that the calc code and matrix, you know, programming, that had been done had been correctly done. It would be a – a high volume, a very, very high volume parallel test.

MR. LEWIS: We're going to object and move to strike all that since, again, we're back to that part where he is absolutely just speculating on this. And here he is speculating on a part that says nothing about testing at all. And he's speculating on, in essence, eight words to get all [1252] of that, destroyed all invoices and regenerated 2.5 years worth. It says nothing about testing.

So that was just total speculation. He has no idea.

MR. ALLEN: I think my question was, is, how would that – what would – how would that be significant as to testing, and he explained that answer.

ARBITRATOR ZIMMERMAN: We will carry the objection. Is this an appropriate place to break?

MR. ALLEN: Yes, sir. Sure.

MR. HARRISON: Could we have a projection perhaps? On Friday, we discussed the possibility that Mr. Brockman's direct would be concluded today, and I am wondering if we might have a midday projection from counsel for UCS as to whether or not we might get there.

MR. ALLEN: I am not 100 percent optimistic that we will finish today, but I am confident that we will

finish tomorrow. There might be a few things that would carry over, but, frankly, I think I'm making pretty good time here.

ARBITRATOR ZIMMERMAN: What if we were to work until you finish today?

[1253] MR. ALLEN: I don't think we could get it all done without working really, really late, Judge. But we're still within our time frame pretty well, I think.

MR. HARRISON: Well, I don't know what all UCS intends to present in their direct case, but we have spent the great bulk of today discussing things that have nothing to do with the claimed trade secret. And, you know, I don't want to interfere with this presentation about these different things, but the Panel did say that UCS should be mindful of following the road map of the May 9 order, and the interrogatory answers, in presenting their case.

And, again, I haven't wanted to object as we have gone off onto these different topics, but we do have to be mindful of the time available now.

ARBITRATOR ZIMMERMAN: Right. Quoting the phrase, "being mindful of," being mindful of that, where are you in terms of this? Because, to the Panel, some of the things that you have been talking about do not seem to go to trade secret issues. I mean, they may go to breach of contract, or breach of confidentiality, but not to trade secret issues.

[1254] MR. ALLEN: Yes, sir. I would say that it goes to three things, Judge. Number one, is that it's my understanding from your rulings that we can talk about how it was misappropriated. Number two, it goes to issues

of – of breach of the confidential relationship, and common-law misappropriation of – of confidential and proprietary information. I – and – and three, to the extent that it overlaps, it also includes our allegations of interference with – with contract.

So, that's what all of these – I mean, some of the issues are kind of interrelated, but I think the evidence that we have adduced to date relate to all of those issues.

ARBITRATOR ZIMMERMAN: Okay.

MR. ALLEN: And I'm trying to expedite it, Judge. I'm trying to get through some of it more efficiently.

ARBITRATOR ZIMMERMAN: Thank you.

MR. HOWARD: I just – before we close, I just want to get our objection on the record, too. It sounds like what Mr. Allen is saying is their direct examination of Mr. Brockman is not going to be finished until Tuesday afternoon, or at the conclusion of evidence on Tuesday. We [1255] have already said that it is going to be a day and a half of cross-examination of Mr. Brockman. That takes us into midday Thursday. I'm sure there will be some redirect.

So it looks file the plaintiffs' first witness is not going to be done until the end of the second week.

We have three defendants who need to put on evidence, and I'm just seriously concerned that we're going to end up in a situation where when Sterling McCall goes last, and it's Friday afternoon, that we – we're not going to have the full opportunity to put our case on.

So, I think we are at the point where we need to start putting some limitations on the plaintiffs' case if we truly anticipate concluding this arbitration in three weeks.

ARBITRATOR ZIMMERMAN: Well, there is not any question, we have to conclude it in three weeks.

MR. HOWARD: Does conclusion mean –

ARBITRATOR ZIMMERMAN: I mean, we have not made – I mean, that is a topic beyond dispute. We have made it very clear.

MR. HOWARD: Well, I understand that [1256] we stop at the end of three weeks. What I don't know is, does at the end of three weeks means the arbitration is over, or that we're going to have to schedule two or three more weeks?

ARBITRATOR ZIMMERMAN: No. It is over. It is over.

MR. HOWARD: Well, then, again, I need to object that I don't think that I should be put in a situation because I'm going to be going last that it is Friday afternoon and I'm told, okay, you've got one hour to put your case in chief on.

ARBITRATOR ZIMMERMAN: That's exactly what we asked you Monday a week ago whether or not we need to enforce time period, and have a stop clock.

MR. HOWARD: And I think that we're there.

MR. HARRISON: And we said that we would watch and see, but now we're three days past when UCS said that they had presented their evidence concerning the identity of their trade secret. And we are three days into

testimony about the watch system, testimony about parallel testing, testimony about this and that, that has nothing to do with the evidence of the trade secret.

[1257] This isn't a parallel testing case. This isn't a design methodology case. This is a claim of misappropriation of trade secrets, which we think we sort of got defined in the plaintiffs' first couple days. And, again, not to interfere, but if now the projection is that the testimony just from the first witness is going to go on into tomorrow, then, we have got to start making a lot of relevance objections.

ARBITRATOR ZIMMERMAN: Okay.

MR. HARRISON: None of this is relevant to this case.

ARBITRATOR ZIMMERMAN: Okay. You – you hear the objection, why don't you give us a report after lunch today –

MR. ALLEN: Sure, Judge.

ARBITRATOR ZIMMERMAN: – where you are and how we're going to proceed?

MR. ALLEN: Sure. I'd be glad to do that, Judge. I have been keeping track of the time very carefully. As I'm sure you know, we spent at least two days last week arguing about their motions. And my – my time limit, as of the end of the business day Friday, as we had 14 – I think this is right – 14.20 hours, if you divide that by [1258] six, which I'm assuming is a regular workday, six hours of testimony, with breaks, and getting started at a reasonable time, at the end of the business day Friday, I had

two-and-a-half days of testimony, and opening statement. My – my time.

So, I told the Panel that I anticipated that it would take a week and a half to put my case on. I think I can beat that, Judge. I think I will beat that. But – but in all fairness to us, you know, I mean, we spent two days of last week arguing about stuff that they wanted to argue about.

So, being mindful of that, Judge, – I'm working toward that end.

MR. HARRISON: Well, if we hadn't have argued about those things, we would have been here for months. Arguing about those things helped define the scope of this proceeding. The proffer of proof presumably cut down the direct by days. And, you know, now that we have some of that defined, and some of that proof in, why we are straying into all of this miscellaneous irrelevant information is a serious issue now because of the time constraints.

ARBITRATOR ZIMMERMAN: We understand. Just report to us at noon, after the noon break.

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[1921] they left because of CARMan? Do you have any evidence they left because of CARMan?

THE WITNESS: No, I don't think so.

Q. (By Mr. Howard) Okay. And you are aware that, in this case, you cannot even seek lost profits, right?

A. I'm not aware of that. Our damages expert is the – is addressing that whole issue.

Q. Well, Mr. Allen didn't tell you that your lost profits claim was stricken from your pleadings?

MR. ALLEN: Judge, that would plainly be improper, what I communicated –

ARBITRATOR ZIMMERMAN: Sustained. Sustained.

MR. ALLEN: – with my client.

ARBITRATOR ZIMMERMAN: But we would like to know whether it's in his pleadings *or not*. You can just – I mean, the pleading is on record; so, is it or is it not in his pleading?

MR. HOWARD: Well, the claim for it is in the pleading for lost profits; but as you'll remember, the Panel struck that portion of the pleading on a motion to strike because it was pled so late in the game.

ARBITRATOR ZIMMERMAN: Right. Okay.

[1922] Q. (By Mr. Howard) So, you're not aware that UCS cannot claim lost profits in this case?

A. As far as I understand, our damages expert has the damages theory for which we're seeking; and that's my knowledge of what's going on.

Q. Okay.

A. And there has been a great number of legal issues floating around. I have been focusing on my expert report. And, I'm sorry, I don't understand everything that's happening.

Q. Fair enough.

So, as we sit here today, eight years after you believe this breach of this contract began – right?

A. The documents would indicate that it began in that time frame.

Q. Eight years ago, right?

A. Yes, that's correct.

Q. – and six years after the CARMan system went out into the market – right? Mid-'97?

A. It went out into market when they sold to Galpin, which would have been the early part of '98.

Q. Five and a half years?

– and four years since you brought this lawsuit, you have not suffered any actual damages [1923] other than your belief that you lost Galpin and Sterling McCall because of CARMan?

A. That's correct.

Q. Mr. Brockman, I believe you testified that you believe the requirements definition is a detailed description of the UCS program structure. Is that correct?

A. That's correct.

Q. And program structure is one component of overall architecture, structure, and design, correct?

A. That's correct.

Q. But you didn't include the requirements definition, or any of its language, description, any of that, in your February interrogatory response, did you?

A. Did not. But as I pointed out, you know, that's a supplement.

Q. Mr. Brockman, my question was: You didn't include it in your February interrogatory answer, did you?

A. That's correct, I did not.

Q. And you had the CARMan requirements document at the time you responded to that interrogatory response?

[1924] A. That's correct.

Q. And so, you had in your possession a narrative description, which you described as a detailed description of the program structure, and chose not to do anything like it in your interrogatory response, correct?

A. I would disagree with that. We have four big boxes out there full of what we attempted to do to describe our trade secret.

Q. Mr. Brockman, in your interrogatory response in February –

MR. ALLEN: Well, he can answer that question, Judge.

ARBITRATOR ZIMMERMAN: I think he did answer it: Yes, all of these boxes.

Go ahead.

Q. (By Mr. Howard) Well, the boxes were in prior interrogatory responses to February, correct?

A. That's correct.

ARBITRATOR ZIMMERMAN: Excuse me. With all due respect, I think this is a matter that has been harped upon and harped upon. I am not sure you're going

to get anything more from this witness. That's between lawyers and how they handled it, and we heard that ad nauseam for two days, and

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[2483] And does the plaintiff ever describe a trade secret, or anything else, with the specificity required by the law, by the June 15th order in this case that spelled out what was required?

No, they don't. They just say: We've got a lot of things here. I am just going to conclude that these are proprietary and that we keep these secret, setting aside the fact that we demonstrate it to tens of thousands of people. We're going to say something in here is proprietary; and you go figure it out, Panel, and then award $60 million against the defendants for this effort and give us an injunction about something, and maybe we'll find out today just what it is the Panel is supposed to enjoin.

That is the plaintiffs' case. It's been smoke and mirrors for four years. Four years we have said, "What is it?" And every other day we would come in here and see them stabbing around at something else. They abandon the architecture definition and staple up the standard design methodology.

Well, that might be interesting if they had presented a case that there was a head start as a result of looking at screens, that CARMan got to [2484] market faster as a result of this chance to design the system by looking at the UCS screens and reports. But Ms. Webster said: I have not considered that.

Mr. Brockman did not quantify any head start. Mr. Brockman nor Ms. Webster quantified any lost savings.

Again, their case is: It's replicated. Assume that, Panel, and give us about 50, $60 million. Okay?

In fact, to avoid summary judgment, UCS made remarkable assertions, things that we've gotten used to in this case, but even with the evidence, with two weeks of evidence, we know they can't show.

Page 5 of their response to a motion for summary judgment: In this regard, although CARMan is Windows based it has the same structure, architecture, and design of UCS's system.

Well, what's going – in the defendants' case, are we going to get around to hearing what that is, this architecture, structure, and design of UCS's system?

Again, at page 22 – willing to say anything in this case, UCS says: CARMan, is a near exact replica of the structure, architecture, and design of UCS' system. Something UCS will not [2485] describe and has never gone to look for.

That's the kind of thing that we've been hearing in this case; and here we are, two weeks into the case. And finally, maybe today in argument, we will hear articulated that there is something that they contend is a trade secret or there is something that they contend is the so-called confidential information.

I mean, we have seen the plaintiffs' case shifting and weaving throughout this trial. You know, they came in first and they said: Yes, our trade secret is the structure, architecture, and design. We're sticking with that. But they never established what that was.

So, then we saw them starting to say: Well, you know, what about structure? What about the database? What about these other little things that, under the order, can't be a trade secret? Well, we're going to say that that's confidential information and that we have got a cause of action about that.

Well, they've – they've not shown that it's confidential. In fact, everything that they say is this subpart that they can kind of back-door by a cause of action not recognized in Texas, we [2486] also have shown is not confidential. We will show legal reasons why those – why those causes – that cause of action doesn't survive, in any event.

And then we see the same thing with their damages expert, Ms. Webster, who in 22 years of practice I have never seen a more bizarre presentation of a damages claim or even read about one.

Ms. Webster comes in here and says: I don't understand what I am valuing. I can't describe it. I have never seen it. I can't draw it, and nobody has ever shown it to me. But I am going to assume, because Mr. Brockman tells me so, that it's in there somewhere; and then I am going to assume that it's the same thing. Next, I am going to look at projections made about another product in 1999, and I am going to say that represents the value of this thing that I don't understand and can't describe. Even though the misappropriation allegedly took place four years earlier, and instead of calling this unjust enrichment, which is what the plaintiffs have said they're claiming in their request for disclosure, this so-called disgorgement, in my testimony here before this Panel, I am going to say, no, this is value. This is value of the [2487] trade secret now.

And then she puts up on the board, with Mr. Allen's assistance, four different potential values: 22 to 40 million, 35 to 50 million, 51.3 million, and then, you know, well, we will throw it up for the Panel, maybe it should be 83 to 100 million.

Have you ever seen any expert come in valuing anything and put five ranges of it, ranging from 20 to $100 million?

Well, that's because she was stuck with what she had done. She didn't value anything. What she tried to do, until, again, the plaintiff realized they needed to shift their evidence and move their case, what she had tried to do is say: This is the benefit that the defendants received based on the acquisition price of the company with respect to DSI and then this is the unjust enrichment benefit that ADP received, except they didn't receive it, they thought they might receive it, in 1999; and so, you know, let's – lets just tally up 50 to $100 million and put that on the reference.

It was the most unusual presentation of a damages case that I have ever seen. She does it [2488] based on her guesswork about what snippets of deposition testimony mean concerning the intentions of ADP in acquiring the software. She says she looked at Hamid Mirza's deposition testimony, but you heard it yesterday. She ignored all of it. We will come back to the other flaws, legal flaws, and other problems with her case; but – with her evidence.

But the entire case has been that way. It's, you know: It's in there somewhere. And then for damages, I'll assume that something I don't understand is in there somewhere, and let's all put a real big number on it. Let's hold up the defendants and put a real big number on it.

You know, I told you before, if the plaintiffs had a real case, they'd have sought an injunction four years ago. They'd have said what their trade secret was. They'd have gone and found it in our software with an expert qualified to do that, and then they'd have put on a damages case.

And in this case, what they have tried to prove is something of a head start case. The defendants got some benefit from looking at the screens, or this so-called parallel testing, and it saved them money. It got them there faster.

[2489] Not a wit of evidence about it. That's not the case they wanted to prove because it's not worth anything. It would be hard to prove, in the first place, and it's not worth anything. Instead they seized on the acquisition price and tried to develop a big damages case about that in order to hold up ADP. That's what this is all about.

We told you before, they do it to try to stop us from developing our product; and now we hear during the trial that: Oh, UCS thinks they're coming out with a new product just like the one that they've been trying to hold us up from – from developing, just like the one that they're going to try and get some kind of an injunction about to hold us up further.

That's what this case is about. It's never been about the merits, its never been about a real trade secret, and it's never been about real provable damages.

So, let's go through their different causes of action.

Trade secret. We know from the May 9 order that the Panel says it is going to be the road map and the point on which the plaintiffs' case would rise and fall. The trade

secret is limited to [2490] the overall structure, architecture, and design of their system as a whole.

Now, tab 7 of Mr. Brockman's report, defines architecture. It includes data fields.

Oh, and by the way, Mr. Brockman did testify the structure, architecture, and design are all basically the same thing. If they're different, the order says that it's all of those things. So, let's just talk about structure – architecture.

Mr. Brockman's definition includes: Data fields used in the software – we know there are 30,000.

Logical collection of data fields and the data records – Mr. Brockman testified that none of his evidence set out data records in the UCS system. If it did, it set out partial data records in a partial amount of the overall structure, architecture, and design; manner in which application software packages are broken down into individual programs; behavior of individual programs, which were defined as, in tab 7 as well, "The program will be built to perform a variety of tasks on data, such as display, add, change, delete, sort, print, edit, calculate, store, place in sequence, validate, et cetera"; integration of the [2491] individual programs to each other – report data content, format, headings, page ejection, sequence, data selection, and totaling. All of those things describe properly – according to the UCS expert, Mr. Brockman, describe the structure, architecture, and design of their computer system as a whole.

They've never provided that in discovery. They've never provided it in this case.

The February 21st interrogatory answers, are what their evidence is supposed to be limited to. As we have harped on repeatedly in the presentation here, the interrogatory responses list 489 data field names out of 30,000 in the system.

Mr. Brockman says: Well, we don't really keep track of the number of data fields that we have, but the petition says it's 30,000.

Three hundred forty-five screen names out of 1480. No description of any logical collection of data fields in the data records. They might suggest that holding up poster boards of screens that actually show data fields would constitute part of that. That's not in the evidence with respect to the February 21st interrogatory answers.

No description of the breakdown of the software application packages, because we know that [2492] not all of the applications are even listed in the February 21st interrogatory answers.

No description of this behavior – that is, the variety of tasks that the programs perform – not any evidence of that.

No description of integration, except to the extent that we offered their picture from their software overview manual that shows something of an integration between the broad applications in the system. Also not in the February 21st responses.

And no description of report data content, et cetera. The February 21st interrogatory answers list the names of reports.

So, that is why even Mr. Brockman has conceded that the February 21st interrogatory answers don't describe the trade secret.

And then, you know, set aside the February 21st interrogatory answers and just look at the entire scope of the evidence in this case. We don't have a description of integration and behavior of records, of logical anything, in the presentation of the plaintiffs' case. Even if they weren't limited to the February 21st interrogatory answers, they have not done it.

Now, they try to sort of bootstrap the [2493] requirements document, which they seem to like a lot better than their own evidence, and say: This describes the architecture of the system. But, of course, we know it doesn't. It's a listing of screen names, essentially. No data fields even in that. No description of integration, as we saw in Mr. Brockman's testimony, no description of behavior, no description of much of anything. And so, the trade secret evidence fails.

Judge Bianchi got all the way to the point of saying: Your trade secret claim is presumed to not exist, and then he let them come and try that case with their February 21st interrogatory answers. And just as Mr. Allen said: Let the arbitrators decide.

Well, it hasn't gotten any better. There is no description of this so-called trade secret in the evidence, whether the February 21st interrogatory answers, or anything else.

Remember the June 15th order and things that are supposed to be described: How the combination of trade secret and nontrade secret elements are combined to form some kind of unique and secret process. I can't quote from

the order exactly, but that order is based on the case law [2494] provided to Judge Bianchi and Judge McCorkle; and it tracks those cases in what is supposed to be described by a trade secret claim. So, that claim fails at the outset.

Going further, you have the issue about if there is some kind of trade secret in something that the plaintiffs have tried to present, it's been destroyed by the plaintiffs' repeated disclosure of these trade secrets. UCS, as I mentioned, demonstrates their system and every application in it, as we showed you in Exhibit 1990, thousands of times, tens of thousands of times that system has been looked at.

Mr. Brockman agreed there might be points on the bus where, you know, six sets of eyes are watching an application as it's being demonstrated. We have got the software overview manuals in evidence; they set out 30 F&1 screen copies, half-a-dozen vehicle inventory screen copies, 30 accounting reports, and on and on as we went through with Mr. Brockman in his testimony.

These demonstrations take place not only in the field by salesman carrying the software around but at dealerships, at the N.A.D.A. conference, on buses, at the Houston offices where

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[2507] sometime in 1995. The reason Alcatel said you can't look at an acquisition price is because it was six months after the alleged misappropriation.

And here she is coming in and saying: Four years after the claimed misappropriation, I am going to take some profit projections or revenue projections, and I am

going to place a value on that 1995 misappropriation. It can't be done.

Then she says: Well, there was another misappropriation when the acquisition occurred in 1999. Well, it was the same thing that got misappropriated.

You don't then jump forward four years in your measurement. You look at what it was at the time of the misappropriation; and here that's 1995, at best. So, again, she's four years off with her already misguided measurement of damages.

Finally, she comes in, and she says: Well, this is value. This is – you know, she doesn't want to say unjust enrichment because she saw the motion for summary judgment that took that one apart. So, she says: No, this is really value of the trade secret.

But the case law also says you don't get value of a trade secret in a misappropriation case [2508] unless the trade secret has been destroyed. If the plaintiff is still enjoying the benefit of their claimed trade secret, you get a reasonable royalty measure of damages because, of course, the plaintiff still has some thing they're using.

So, this value thing that she tried to hobble around this week also fails because you don't get that value. You get a reasonable royalty, at best; and she testified she hasn't done a reasonable royalty measure of damages.

So, where does that leave us?

Well, let's talk about confidential information. I know I'm running a few minutes over. I will be finished in a few minutes.

This so-called confidential information claim, you know, is part of the smoke and mirror and this ducking and weaving, as well.

Bianchi said: You're done. This is your case.

So, we're going to claim misappropriation of confidential information.

Well, there is no such thing. Stewart & Stevenson says so. Stewart & Stevenson cites at least four of the cases provided to you yesterday by the plaintiffs as being trade secrets cases: The [2509] Jeter case, the Dannenbaum case, the Wellex case, the Huffines case. All of those are discussed in Stewart & Stevenson, and they say Texas doesn't recognize such a claim unless it's a trade secret claim.

So, even if it were preempted by the Copyright Act, it's no different here. They're saying something in our software was copied, something was so-called misappropriated. The copyright preempts it.

Limitations. What they're really claiming here is that we've got a confidentiality clause, however narrow it really is in the contract, and that it was interfered with. That's a tortious interference claim as to DSI and ADP, and limitations bars that claim, as we already discussed.

Even if there were a claim for confidential information, the plaintiff has to show that their information was confidential; and we've already discussed that there isn't anything about the level of trade secret of confidential information that they're claiming that is confidential.

Now, there are cases that say it doesn't [2510] matter if the defendant got confidential information by getting it

from the plaintiff; but even in those cases, the information was still confidential. You know, their – their customer list cases, things like that. But if the defendant were to show: Wait a minute, the customer list has been shown to 10,000 other people out there, how could there be such a claim, even if the law in Texas recognized it?

And then, no evidence of damages. And this is important. Remember, Ms. Webster said: The only thing I am here to testify about is the structure, architecture, and design of the system as a whole; and the only thing that I am trying to measure damages with respect to is that thing.

So, if there is some individual screen, if there is some little program, if there is some collection of data that is confidential and was misappropriated, there isn't a lot of evidence about damages related to that. The only damages evidence they have goes back to their defined trade secret.

Similarly, they come in knowing that if the damages case fails, they'll say: Well, give us an injunction.

An injunction about what? To get an injunction, they have to establish a cause of

* * *

[2655] Q. Pardon me?

A. It's an application.

Q. Yes. And we know the applications make up the system as the whole, right?

A. We don't sell telephone cost control to everyone.

Q. It's part of the system UCS has as a whole, right?

A. It's part of the system that we offer for sale, yes.

Q. And is vehicle leasing an application in the UCS system as a whole?

A. There's a lease module in the F&I system.

Q. Vehicle leasing, is that what it's called?

A. There is an obscure lease – vehicle leasing company application, but that is typically not sold.

Q. But it is part of the UCS system as a whole, isn't it?

A. It may or may not be, depending on if it was sold or not.

Q. Oh, so what you're saying is that the system as a whole might also shift and move depending on who the customer is?

A. The overall system is – is the basic [2656] products; and you can determine the overall system, architecture, and design by not having every piece of the UCS system.

Q. Well, is there front end management screens listed in your interrogatory answers, Mr. Nalley?

A. Yes, they are.

Q. Now, is that an application that is part of the system as a whole, as well?

A. If it was sold it could be, yes.

Q. So, I guess what you're saying, is if your company only sold telephone cost controls to a customer that would be the system as a whole on one day; and if it sold 80

applications to another customer, that would be the system as a whole on another day?

A. That's a gross misrepresentation.

Q. Well, isn't that really what we can conclude from what you're telling us, Mr. Nalley?

A. Absolutely not.

Q. All right. Is F&I, finance and insurance, an important application in the UCS system, Mr. Nalley?

A. Yes, it is.

[2657] Q. And is payroll?

A. For some customers, it is.

Q. And is vehicle inventory?

A. Yes.

Q. All right. Let's talk next about your listing of reports here from February 21st, 2001. And we know from the definition of architecture that is provided for here by your company that the architecture includes all of these different features of reports, correct?

A. Yes.

Q. Data content, format, headings, data selection, totaling, sequence, and so on, yes?

A. Yes.

Q. But beginning at page 50 in your interrogatory answers, which your company stipulated are a complete description of your trade secret, there is no information

provided with respect to these reports other than what the company has named them, right?

ARBITRATOR SOUSSAN: I need to ask you a question for clarification. In answering these interrogatories, what's listed is an identification of what UCS believes DSI misappropriated, correct?

[2658] MR. HARRISON: No. What these are is a listing of what UCS has stipulated is a complete description of their claimed trade secret.

ARBITRATOR SOUSSAN: So, when it says here on the first page, "The following chart identifies each data field that DSI misappropriated by the UCS data field name," and the DSI data field name together with a description of the data field, that's not saying that it's a listing of what they claim is misappropriated?

MR. HARRISON: That's a part of the UCS contention, but what –

ARBITRATOR SOUSSAN: I am just reading the 2-21 answers. I'm not –

ARBITRATOR MCGOWAN: Susan, you've got to read the May 9 order as to what – what's happened after that.

MR. HARRISON: We're trying this case, at least in part, based on what was stipulated to by Mr. Allen as to what these answers really were, to avoid dismissal of the case; and they've been held to that promise and stipulation now.

And we've been planning to try our case based on that stipulation and order. And it's not anything about what

UCS contends was misappropriated [2659] in part, which we're also addressing, it's about whether or not the trade secret can be described.

MR. ALLEN: This goes back to three weeks ago –

MR. HARRISON: It does, indeed.

MR. ALLEN: – where we argued about – what the scope of the order was and whether or not it required me to, quote, identify, end quote, the trade secret.

And what we did in these answers to interrogatories, after trying – this is the fifth time – we identified the overall structure and design which consists of these key elements.

Now, Mr. Harrison continues to ask my witnesses about the detail, about – of exactly what might be – if you went and looked one of these up, if you looked these screens up in section – on – beginning on page 30, if you went and looked them up, would you be able to see the screen and the data fields and – and what it consists of?

We have produced as part of these responses four boxes of detailed information regarding exactly what he says – or tries to suggest is not in here. I have got them in the hall, and I'll be glad to show them to you.

[2660] When we produced those documents that showed the detail of exactly the way these screens are set out, they said that was too much. They said, "We can't tell what your trade secret is because it's too many pieces of paper."

So, that's when we went back to the Judge and we outlined in these in the data fields what we had secured

from the data structure, because they – because we had produced that, what we had secured from the requirements definition, every screen that's listed here came from their disclosure in the requirements definition and the reports that were in the requirements definition.

Any detail that they think that has been omitted, we have shown them that. We've given them the data structure. We've given them copies of all of our manuals from 12 point to the present. That is eight years of manuals that include the screens and a description of the functionality of the system that we have been through over and over again. We have provided to them four boxes of a description of the functionality of the system that includes references to the screens.

There isn't any surprise here. What's listed in these answers to interrogatories comes [2661] directly from the requirements definition; and that's the foundation and the misappropriation of the structure, architecture, and design of the system.

ARBITRATOR ZIMMERMAN: Well, for the third time for the panel, because I think this argument has been made twice before to the court, and so we're only – this is only the third time we're hearing it –

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: – the issue still is presented – and we're not going to get it resolved right now, so y'all can just sit down and let's just keep going – we're not going to get it resolved, which is, whether or not you, the plaintiff, are held strictly to the words on this paper –

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: – and to no ancillary document, or 45 boxes that are in the hallway, or anything else. And that is a continuing thorn in everybody's side, whether this is enough and whether this does it.

If I let – if we listen to Mr. Harrison, you have pierced on your own sword. The case is [2662] over. Match game, end game.

We are continuing to listen to this, so we don't need more argument over it, although, with all due respect, I heard one of the arbitrators ask a question, which is there. But we're not going anywhere with the question or the answer right now.

MR. ALLEN: I thought we had been through all that, too, Judge. I thought we had been through all that.

MR. HARRISON: Well, I have to respond to what Mr. Allen said –

ARBITRATOR ZIMMERMAN: Sure.

MR. HARRISON: – because it's far out of context and far afield.

ARBITRATOR ZIMMERMAN: But you have responded to him before, and I know what your response is.

MR. HARRISON: Well, I bet I have got something that you haven't heard, at least this week.

ARBITRATOR SOUSSAN: This week.

ARBITRATOR ZIMMERMAN: If that's true.

MR. HARRISON: What Mr. Allen said he tried to do and the company that he represents [2663] were sanctioned for, in January of 2001, I believe, they tried to say it's all there somewhere in those documents; and Judge Bianchi and Judge McCorkle said that violates the June order that says you can't do it that way.

ARBITRATOR ZIMMERMAN: June 15.

MR. HARRISON: Yes.

And so, they came back again with this listing and then stood in front of Judge Bianchi and stipulated that this listing was a complete reference to their trade secret, a complete description of their claimed trade secret and Judge Bianchi took them at their word.

Instead of dismissing their case, he said, "Okay. Prove your trade secret with that." And it's in the orders.

So, we're ready to try the case. But nothing would be more unfair for us to have to try a different case after the road map was laid out in the orders in the February 21st interrogatory answers.

ARBITRATOR ZIMMERMAN: And you-all have heard me say before, either through discovery master of the arbitration Panel or as chair of the Panel through this, that the perplexion that we have [2664] got is whether or not we look at this and it's – if it's not written in word that the human eye can see, you – you perish on it.

You continue to suggest that we do not have to look only to the word on the paper, but we can either look to A, documents around it; or B, look to the words in a very liberal way. And if there is any inclusion of a concept

within any screen that can be pulled up and it's anywhere there, then its there.

And we understand. I mean, I – we have got it. We have got the message. We just are very – we're very slow on the uptake of making a decision on that issue.

Let's continue, please.

Q. (By Mr. Harrison) Talking about your data records, Mr. Nalley, that – I'm sorry – your reports that are listed beginning at page 50 of your interrogatory answers, my question was: These only list the names of reports – names assigned to reports by UCS, right?

A. The list is the list.

Q. No data content?

ARBITRATOR ZIMMERMAN: Would the court reporter read back the last question, other [2665] than "No data content," before that.

(Requested testimony read back.)

THE WITNESS: I said the list was the list, Judge.

Q. (By Mr. Harrison) Is the answer that the list is names of reports, Mr. Nalley?

A. The list is names of reports.

Q. No data content, format, headings, page ejections, sequence, data selection, or totaling, right?

A. Not true. There could be – when you say used vehicle listing, that would have the vehicle data in it. Sales stock summary, it would have the stock and it would

have, you know, the sales information summary. It would have those kind of data records.

Q. Somewhere?

A. In – they would be accessed to be able to print the report.

Q. Now, we haven't seen, even outside of these answers, in this case, you've been here, we haven't seen these hundred-plus reports to know what that information would be, have we?

A. I don't believe we've seen all these reports.

[2666] Q. And, according to your definition, they also make up the structure, architecture, and design of the UCS system as a whole, yes?

A. It would be an important part of understanding the entire system as a whole, if you were a designer and trying to build a system like the UCS system.

Q. As would all of those applications and data fields that aren't listed here, right?

A. Which ones aren't listed?

Q. Well, we've covered that a few moments ago. Vehicle inventory, payroll, F&I with respect to data fields, with respect to screen names, or program names, applications, all of the applications from data communi – dealer communications, telephone cost control, vehicle leasing, front end management, those were all part of the system as a whole, right?

A. And the screens for those programs are indeed listed here.

Q. Yes. But there are 1480 screens; and even if you want to say that there's something that we can find in these screen posters, only 345 of them are reported in your interrogatory answers, right?

A. That's what's in the interrogatories. And

* * *

[2595] because the Statutory Trade Secret Statute, Civil Practice Remedies Code 134.005 says, for theft of trade secrets, you're entitled to attorney's fees.

And the case interpreting that, Johns against Ram-Forwarding, 29 SW3d 635 – it's a Houston First District case – says: Even if you don't recover damages, even if all you show is they have got liability, they took the – they took the secret, that's enough. You're entitled to attorney's fees.

So, there – so, the notion that the judgment should be entered because remedies haven't been proven is – is simply fallacious.

ARBITRATOR ZIMMERMAN: Mr. Harrison:

MR. HARRISON: Could I have three to five minutes?

ARBITRATOR ZIMMERMAN: You may.

MR. HARRISON: There are still gaping holes in every one of the plaintiffs' claims. And it's very simple. We don't have to try and breathe life back into Ms. Webster's testimony. We can start simply by looking at this construction of all of the various causes of action that the plaintiffs have put up. It's very simple.

Trade secret misappropriation the May 9 [2596] order: No proof. End of claim.

Ms. Webster's damages case, limited exclusively to the defined trade secret. Structure, architecture, and design of the system as a whole is what she said she was measuring and valuing. Okay? If they haven't proven the trade secret, if it's been – if the trade secret claim is preempted, or the other reasons we have shown don't establish the trade secret cause of action as defined in the May 9 order, there is no evidence of damages on these claims, on these claims, or on these claims. End of case with regard to the damages claim. We don't have to talk about if Ms. Webster is still confused or these ideas about what the University Computing case say. The case is over. All right?

All she attributes damages to is the defined trade secret. Her testimony is crystal clear on that. So are her reports. She does not attribute damages to any of these other things. And so, if she – if the plaintiffs haven't proven the May 9 order, defined trade secret was described in the manner required, the case is over.

Now, if you talk about unjust enrichment, just addressing what Mr. Laycock says for a minute, in Texas, unjust enrichment has to be based on [2597] actual economic gain being taken back from the defendant.

The University Computing case never once mentions the idea of unjust enrichment. It's a trade secrets damages case based on whether or not the plaintiff had lost profits or reasonable royalty. You can call it unjust enrichment for as long as you want, but you'll never find the idea in that case. This second measure that's referred to throughout the opinion is called the reasonable royalty standard,

something that Ms. Webster said she hasn't undertaken to try to do.

Now, you can call it value, you can call it the stolen car, but the University Computing case is a reasonable royalty case, and she didn't do it. Everyone in the room knows it.

The idea that you attribute value to something and then in a trade secrets misappropriation case you say that's what you order the defendant to pay by analogizing to a stolen car is absolutely ridiculous. This isn't a stolen car. At best, this is a copy of a car. And that's why, in trade secrets cases, you look at reasonable royalty measures. Something's missing in the [2598] evidence in this case.

So, what are we left with? We're left with Mr. Allen's request for an injunction. And how was it described? "Just tell them not to use anything that was in our system that's in the CARMan system or might be in the Jupiter system."

No Panel, No Judge, no appellate court can do that. What are you supposed to do? After the four years that we have spent trying, spend four more years trying to figure out what we have in our system that they've never looked at and then tell us to stop using it?

You know, Mr. Allen says: Well, Mr. Brockman never got to look at it.

Well, for one thing Mr. Brockman was never permitted to look at it; Number 2, they never asked for it until the discovery cutoff was over.

So, yeah, too bad they didn't look at it. Too bad they didn't think that maybe that would be a good part of a

trade secrets case involving computer software, to think to do some time during the past four-and-a-half years. Maybe they should have brought in the Tulane professor, even in the last two weeks, to flange up that glaring hole in their case. But we know why the professor isn't here,

* * *

[4246] screen numbers that are listed here and the requirements –

MR. HOWARD: I would just like to renew the defendants' objection to the extent this is being offered to describe the UCS overall architecture, structure, and design since it is outside the scope of the February 21st interrogatory answer.

ARBITRATOR ZIMMERMAN: Sustained.

ARBITRATOR MCGOWAN: Is this being offered?

MR. ALLEN: Judge, these are – these are all just copies of screens that have been already – already offered into evidence in terms of the manuals. It's just that it's collected together.

ARBITRATOR ZIMMERMAN: Excuse me. I didn't say you couldn't offer it. I'm sustaining his objection of offering it to supplement your answer to interrogatory. I don't regard it as a supplement to answer to interrogatory, but it is what it is.

MR. ALLEN: Right. Okay. It's otherwise being received into evidence, Judge?

ARBITRATOR ZIMMERMAN: Yes.

[4247] MR. ALLEN: Okay.

ARBITRATOR ZIMMERMAN: But these are screens that have already been introduced into evidence, basically.

MR. ALLEN: A few of them have been introduced into evidence, Judge, in terms of talking about them on the boards, and identifying them in his – in section 35 of his report, but this is a collection of all of the ones that are listed, and all of those have been offered into evidence, too.

ARBITRATOR ZIMMERMAN: That's what I just said.

MR. ALLEN: What's new about them is that each of them now has a new number on them, which has now been added and calculated and put on a summary on the front representing data fields, all new, never put in any exhibit list, never put in any document that we have seen before, and the whole point of this document is to calculate data fields, and make a new assertion.

So, these are new documents. They have not been entered, and they are not a part of anything, and they have never been identified. This is supplying a new book of information 20 minutes before the end of the three-week arbitration.

[4248] ARBITRATOR ZIMMERMAN: The data fields are part of the original – the number, of part of the original testimony of Mr. Brockman?

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: In his deposition or anyplace?

MR. ALLEN: The data fields were part of his deposition. The screens are part of his testimony. Both the screens in particular, Judge, are set out in the answers to interrogatories. They come from the requirements definition, and all this –

ARBITRATOR ZIMMERMAN: Let me reask the question.

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: Is there something that I can look at, that would show me that there is 22,989 data fields?

MR. ALLEN: Yes, sir.

ARBITRATOR ZIMMERMAN: Other than looking at this page?

MR. ALLEN: Yes, sir. You just have to count them yourself.

MR. LEWIS: It's in there somewhere.

MR. ALLEN: I mean, you would have [4249] to look at the screen and look at the manual, and both of those are in evidence. That's the only difference, Judge.

MR. BROWN: So if you would like to enter it for demonstrative purposes, perhaps, but it should not be entered into evidence. And it does not rebut anything that's gone on in this case.

MR. ALLEN: I offer it for the – for the Panel's convenience, Judge.

MR. HARRISON: Well –

ARBITRATOR ZIMMERMAN: It will be accepted for the Panel's convenience. Instead of anybody counting the number, you are representing, as an officer of this arbitration, that if we were to manually count, it would be 22,989, plus or minus five percent?

MR. ALLEN: Yeah. Give me a little – that's right. Give me at least one percent, Judge. It's Exhibits 254 through 277 are the manuals that have been previously offered and admitted into evidence.

ARBITRATOR ZIMMERMAN: But all of these have been produced?

MR. ALLEN: Oh, sure. Yes, sir.

ARBITRATOR ZIMMERMAN: Okay.

* * *

[4282] they just completely and intentionally ignored those contractual obligations.

ARBITRATOR ZIMMERMAN: Okay.

MR. LAYCOCK: Your Honor, could I clarify one thing? We had a bit of miscommunication here. So in this document there are 13 cases bound in with a table of contents. The leading case on joint and several liability is slipped into the back unbound, but it's in the back.

ARBITRATOR ZIMMERMAN: What's the name of the case?

MR. LAYCOCK: Barnes versus Eastern and Western Lumber Company

ARBITRATOR ZIMMERMAN: And what's the date?

MR. LAYCOCK: 1955. Your Honor, we picked that one because it has an extension discussion and gathers lots of others.

ARBITRATOR ZIMMERMAN: Thank you. Okay.

MR. HARRISON: If it would be all right, could I stay seated, so that I can see my notes –

ARBITRATOR ZIMMERMAN: Absolutely.

MR. HARRISON: – a little bit [4283] better?

ARBITRATOR ZIMMERMAN: Whatever you'd like to do.

MR. HARRISON: When I – last Saturday evening, I went to see "Finding Nemo" –

ARBITRATOR ZIMMERMAN: You broke your glasses.

MR. HARRISON: – with my daughter, and I realized I had forgotten to say a few things, and I thought about that all through the movie instead of watching the movie. So I wanted to be sure that I try and touch on all of my points.

And I understand that I'll have about 20 minutes, is that about right?

ARBITRATOR ZIMMERMAN: That's about right.

MR. HARRISON: Okay. We told you three weeks ago, now, that the plaintiffs couldn't prove their case. And the case that we came prepared to try was the case that the Court ordered be tried. And that order, the

May 9th order, set out what the plaintiffs were supposed to prove as their trade secret, and what the evidence the plaintiffs would be allowed to present would be.

As Judge Soussan noted, we have all [4284] memorized what that is. It's the structure, architecture, and design of the system as a whole. And not, importantly not, any individual process, formula, pattern, device, or compilation of information, or other matter.

Nothing except the overall structure, architecture, and design of the system in this case is a trade secret. Data fields are not a trade secret by the plaintiffs' stipulation. Screens are not a trade secret by stipulation. The database is not a trade secret by stipulation. All that we are here to try is that one trade secret.

And then, we get the February 21st answers, finally pinning down the order, finally pinning down what the evidence would be, as to what this stipulated trade secret would be, and we came to try a case about that. 489 data fields, 345 screen names, and 100 plus report names.

And we said that the plaintiff couldn't prove their case with that evidence, and that definition of their case, and there is no question that they have not. There is no question that we have not seen the overall structure, architecture, and design of UCS's system as a whole.

They admit it. Professor Hassell admits [4285] it. Mr. Brockman admits it. Mr. Barras, the software development vice president, admits it. Hamid Mirza says it. Professor Davis says it. And we agree with all of them. They have not established their trade secret, either by the February 21st, answers, or by what they prefer to work off

of, though the order prohibited it, the requirements document.

Mr. Brockman testified that the requirements document does not describe what their trade secret is, but that's what we heard the most about, over our objections, politely carried, throughout this proceeding.

Today we hear nothing about overall structure, architecture, and design mentioned by Mr. Allen in the time that he spent closing. We hear nothing about the February 21st interrogatory answers, because they know, as well as the rest of us know, that that doesn't establish anything in this case.

Now, I know that – well, let me just say, that now what we hear, you know, the February – or the June 19th or 20th version of what UCS's trade secret is today, is the database, They say, it's – our database is a trade secret, and you should [4286] enjoin the database in CARMan, you should enjoin the database in Jupiter, or any other product that might follow on it.

We know ~~from the s~~tipulation and order of May 9th, that that, by definition, is not a trade secret, and can't be enjoined. We know that they have never described, even their own database, except to the extent of 489 data fields, much less ever described the CARMan database except for data fields, a relational database completely different from theirs, to suggest that our database somehow copies theirs is to suggest that an apple orchard is the same as a corn field. They're just completely different, but most importantly, UCS has never found the database for the CARMan system because they've never looked.

But that's now what they say they want to enjoin. Why? Because it gives them a commercial benefit. It stops the production of software by ADP, to hang up the ADP next generation database. But we know that it's by definition not in and of itself a trade secret, even if it's a copy of the UCS flat file system, because the database of the UCS system, by the May 9 order, is not a trade secret.

[4287] Now, we keep talking about the May 9th order, and, you know, I told you at the outset of this case, that what resulted from the May 9th order was a severe sanction. And it is a severe sanction. It was a limitation on UCS's evidence that prevented them from being able to prove what they have defined as their trade secret, this architecture, and all of the components of architecture.

And we've gone through this hearing now for three weeks, sort of acting like that order, while there, might not really count, that maybe it can be side-stepped, or maybe it can be expanded on, but don't forget what went before that order, five sanction orders, the January 2001 order that said they would have one final chance to describe their trade secret. We had been dealing with ducking and weaving and hiding of what the claim in this case was, as have the Court, and the special master, for two-and-a-half years.

You have seen a little bit of what we have had to deal with for those two-and-a-half years, because still, even if you go beyond the May 9 order, even if you disregard it, we don't know, any of us, in this room, I submit, what this structure, architecture, and design of the UCS system as a [4288] whole is.

Remember, Mr. Nalley's testimony? No, it's not in the February answers. You would need the manuals, and

you'd need the system, and with that information, you could figure it out.

Well, that's not evidence in any proceeding. That's exactly the kind of thing that Judge McCorkle rejected when he said in the transcript of the hearing that we have provided in earlier briefs, that you can't just ball it all up and drop it on me and say, it's in there somewhere.

Now, the Panel expressed, on Monday, a concern. Well – or at least indicated it was still undecided. Can we go beyond the May 9 order, and can we go beyond the February 21st interrogatory answers, to allow additional evidence of this trade secret? And I would suggest to you that the answer to that has to be no.

The June 15th, 2000 order says very clearly, UCS, you must identify your trade secret by interrogatory answers, and not by reference to other documents.

So, the Court, in discovery, said, you must provide us a complete description of your trade secret, and you can't reference a bunch of other [4289] things. And then when they tried to submit a bunch of manual pages, they were sanctioned for it.

Now, would it be fair, would the Court intend that in discovery, the plaintiff cannot refer to other documents, but at trial they can? It is the exact opposite of what any judge could intend in requiring the evidence to be disclosed before trial.

But that's what they have done here. They have basically come in and admitted that their answers don't describe their trade secret, and so they have hoisted on us a dozen or more manuals. Today we get a fat volume of

screen pictures, and somewhere in all of that we're supposed to find out what the architecture of the system is.

Now, it would be very much unfair for the defendants to have to come in here and find out what they think their trade secret is and defend that case. And the reasons are obvious, the reasons that we asserted throughout the series of sanction orders. We need to know so that we can show you've disclosed it. We need to know so that we can show that it's in the ADP system. We need to know so we can determine whether or not it's unique, whether or not it's not known to others in the industry, others in automobile dealership management, others in [4290] automobile dealer management systems. And if we don't know, we can't prepare a defense. And that is exactly why the Court wrote its orders the way it did, and why ultimately it limited UCS's evidence the way it did.

Now, what do we hear in this case? We hear that the architecture is the data fields, the way they're organized, the programs, and how they're broken down, the applications broken down in the programs, integration, behavior, and then record content, and all of those other things, in the architecture definition.

None of that was presented with regard to this system as a whole. Certainly not with respect to the discovery responses that the plaintiff is bound to, the February 21st answers; but even if you go beyond that, and disregard the May order, disregard the June 15 order, and say, what has the plaintiff presented here? You're left with this jumble of information that we know doesn't describe anything that the Panel can articulate in an order.

The Panel ultimately is going to have to say, the trade secret is claimed to be the structure, architecture, and

design of this system as a whole, and here is what it is. And how is the [4291] panel supposed to do that?

Remember I asked Mr. Nalley that. I said, how are we supposed to do that? How are the defendants supposed to figure it out? How is this Panel supposed to figure it out? And he suggested that by going to these manuals, and searching out this information, sooner or later somebody might cobble it together, along with access to the system.

That is not proof of a trade secret, as required by the cases, or as required by the June 15 order, paragraph 3, which sets out what they have to show. It doesn't meet their own definition of architecture, which we have already discussed.

Separate from the interrogatory answers, again, if we disregard the May 9 order, you have Mr. Brockman's report, but today he came in and said, this report is not intended to describe the architecture of our system as a whole. This report is intended to describe what the BSI and DSI people did in misappropriating that trade secret.

And that is what this case has been about through all of the plaintiffs' evidence. Not saying what it is in the UCS system, or ever suggesting, much less showing, that any of it exists in the CARMan software; but instead, simply spending a lot [4292] of time talking about, they looked at this, they looked at that, they wrote down these screen names, they copied these fields.

Well, we know none of those things individually, or in collection by the Court's order, unless it's the overall system as a whole is a trade secret. So what were we talking about? We were talking about the hole instead of the donut.

I said before, when we – when we argued this case last week, this case has no beginning and it has no end. It never describes the claimed trade secret in a way that any damages or other relief can be connected to it, in a way that the law requires, in a way that the June order requires.

And at the end of the day, we're left only with Ms. Webster's assumption that this specific trade secret, which she said is the only thing she has tried to measure with respect to damages, the overall structure, architecture, and design, is in CARMan, and is further in Jupiter, and if you accept those assumptions, here's her damages measure.

But you can't accept those assumptions, because there hasn't been a speck of evidence in this case that the overall structure, architecture, and design of the UCS system is anywhere to be found [4293] in CARMan, and further, anywhere to be found in the Jupiter next generation product.

So, you don't have a beginning. You don't have an end. We have spent a lot of time talking about the middle.

Now, again, no description of data records, integration, behavior, manner in which applications are broken down, and report content, of all of this system, 117 applications, 1480 programs, reports listed, some 100 plus, without any information about what the details of those things are that constitute what Mr. Brockman says is architecture.

So, again, the May 9 order says there is no trade secret in the evidence in this case. Every one of these boards, all of these manuals, every screen, every data

field, is not a trade secret unless it's tied together for the defendants to look at, for the Panel to identify, and it hasn't happened.

Even if you, again, ignore the May 9 order and say, okay, maybe some of these things we'll say are confidential, or are a trade secret, you have the overwhelming problem of the plaintiffs' disclosure of that information, repeated disclosure,

* * *

[4298] that since we look at other people's screens, other people look at our screens, right down the line, whether it's for the conversion purposes, whether it's for sales and marketing purposes. If that's the case, in this industry, there is no secret with respect to these individual items that they claim were looked at by DSI or BSI. Trade secret status, confidentiality, with respect to these items is gone.

So you look to the June 15 order, you look to the case law, which requires that to prove a trade secret, you must show that this information is separate from the general knowledge of those involved in automobile dealership management or the specific knowledge of those skilled in automobile dealership management systems, and what are you left with? You're left with code. You're left perhaps with how certain aspects of this software system are integrated for certain behaviors of these programs, none of which have been shown in this case, even if you go beyond the February 21st interrogatory answers.

So, when we talk about this claim without a beginning and without an end, what I'm saying is that Ms. Webster's only damages number was attached [4299] to this thing that the plaintiffs have not proven. She assumed it's in

there, she puts a value on it, but because her assumption is facially invalid, there is no damage case in this case.

Remember, Ms. Webster said, that's the only thing that I have measured, and if those assumptions fail, the plaintiffs don't have anything else to point the Panel to as a damages element.

The Panel would be in the position, if it were to say, all right, we have decided that the database is a trade secret, and that despite the fact there is no evidence there, maybe it is in there, and so we want to award some damages, the Panel would have to pick a number out of the air because nobody has put a number on a database, or on a function, or on an application.

Let's say you wanted to say, well, we think that watch system sounded interesting and might be secret, and we will assume, even though it's not been shown, that it's in the CARMan system. How would the Panel award damages with respect to misappropriation of that particular program or function? It would, again, have to pick numbers out of the thin air.

Remember, Ms. Webster says, the [4300] architecture is replicated in these two programs. And if they're not, she agreed that her testimony is irrelevant. And that's where we are in this case.

Now, Ms. Webster's evidence has a lot of other trouble, and we've discussed it. We have briefed it. I won't spend time on it. But fundamentally, she has not measured value of anything.

Professor Laycock says value is what we're looking at here. Not really. Read the University Computing case. It says that you can look at the plaintiffs' loss, you can look

at the defendants' profits, or you can look at the value of the secret to the defendant; and then it goes on to say, this second technique, referring to that approach, is called the reasonable royalty standard. And that is what is discussed in the University Computing case. Nothing else. And we know Ms. Webster, by her own admission, didn't do any reasonable royalty analysis.

Interestingly, in the University Computing case, at the end of the day, they determined that the product had been licensed once before for $220,000, and because reasonable royalty is a hypothetical licensing negotiation, and the elements [4301] that are considered are described in this case, the Court said, that that prior license of that software was good evidence that the jury could have relied on in awarding $220,000.

I don't think the words "unjust enrichment" are mentioned in this case. But what it's about is plaintiffs' loss, defendants' profits, or reasonable royalty, and Ms. Webster decided to try to measure something different.

Finally, a couple other points. Injunctive relief. Well, I have spoken to that briefly. Mr. Allen suggests in – in an area where the United States Supreme Court has said that the injunctive relief must be specifically phrased, so that the defendants know exactly what is to be enjoined, he has suggested that the – the CARMan database be enjoined, when we don't have any description of what that is, and no proof.

What he's really talking about is data fields, or at least that's all the evidence we have, is some data field in the CARMan system, and I'll assure you that the months of the year and the names of customers will be in the next

generation product. But we know that those can't individually be a trade secret, as the database can't be a trade secret.

* * *

UNIVERSAL COMPUTER SOFTWARE, INC.

UCS

This Agreement is between SWT Investments, Inc.
Name

6060 Southwest Freeway
Address

Houston, Texas 77057
City State Zip

hereinafter referred to as Customer and UNIVERSAL COMPUTER SOFTWARE, INC. hereinafter referred to as UCS.

THIS AGREEMENT IS SUBJECT TO ARBITRATION UNDER APPLICABLE STATUTE.

SECTION 1. Definitions.

Application Program – A series of programs which enable the computer to perform a specific task such as the processing of a payroll.

Conversion – The process of transferring the records of the Customer from the previous manual or computer system to the UCS System using the UCS application programs.

Operating System – A series of programs which enable the computer to perform its general internal supervisory processes that are not specific to any application program.

Program – A series of instructions that tell the computer how to perform a task. The computer cannot perform any task, however simple, without a program.

Software – A general term used to describe an programs used inside the computer to make it perform any function.

SECTION 2. Nature Of Services To Be Performed By UCS.

A. UCS will install the operating system and application progams [sic] specified in Schedule "A" on the Customer's IBM computer at the Customer's location.

B. UCS will provide operating procedure manuals which describe how the operating system and application programs work.

C. UCS will provide training classes on general system operation and application program usage at UCS's Educational Facilities in Houston, Texas, for the number of business days specified in Schedule "A". (See Item H).

D. UCS will provide on-site installation support and training for the number of normal business days specified in Schedule "A" for each application. The scheduling of these installation support days shall be done at the mutual agreement of UCS and Customer, however, all of the days for each application must be scheduled continuously (i.e. – not including a weekend). At the Customer's choice, installation of certain applications may be delayed, however, this election does not relieve Customer of the responsibility for timely payment according to the terms of this Agreement.

In the providing of installation support and training, UCS is not responsible for the actual manpower effort involved in the conversion, but is only responsible for directing the effort and training the Customer's personnel involved.

[The only exception to the above paragraph is when UCS converts parts inventory data at a

per-part-number charge, such charge being set out on Schedule "A"].

E. UCS will provide telephone support services for all questions and problems with all programs during UCS's regular business hours during the term of this Agreement. UCS will bill the Customer for long-distance charges, if any, incurred with such support.

F. UCS will correct all program errors at its expense during the term of this Agreement. A "program error" is defined as the failure of the program to perform a specific function that it has been designed to perform. In cases of question. UCS shall make the sole determination of what functions the program was designed to perform.

G. UCS will, from time-to-time at its own decision, make modifications and enhancements to the operating system and application programs During the term of this Agreement, Customer shall receive all generally released enhancements and documentation applicable thereto.

H. UCS will provide training classes on a scheduled basis for all application programs. Customer may send new personnel to these training classes for education at no charge except for the daily service charge which includes lunch and all materials described in Schedule "A". Customer is responsible for travel, lodging and meals other than lunch.

UCS is specifically not responsible for retraining dealership personnel in cases of turnover. The sole responsibility of UCS is to provide training classes to which Customer can send personnel for training.

A current schedule of training classes is available at any time upon request Reservations can be made by contacting UCS at its home office in Houston, Texas. All reservations for a specific training class are

subject to space availability. Additional training classes will be scheduled based on sufficient demand Customer may send as many employees to training class as he desires during the term of this Agreement. Customer shall pay for the travel, lodging, and meal expenses of its employees while they attend UCS schools.

If the Customer should require support services in addition to those provided under this Contract. Customer may request UCS to provide consultation services at the then current time and material rates for such services. These consultation services will be provided to the Customer on a mutually agreeable schedule.

For example, additional charges for consultation may arise out of the following illustrative situations:

1. Customer has had unexpected turn-over in personnel of one or more key persons and had failed to maintain any back-up people. Since it takes several months for a new person to become fully competent (including attending training classes) in some of the more critical systems (particularly Accounting and Payroll), interim assistance may be required from UCS to maintain a stable operating environment. Where this situation requires visits to the Customer's location by a UCS representative, this is a billable consultation.

2. The scale and fully-integrated nature of UCS application programs are such that sometimes, for reasons beyond UCS's control (Customers employee resistance, management changes required, paperflow changes required), additional support and training at the Customer's site is required over and above the number of days listed in Schedule "A". When this situation occurs, this is a billable consultation.

3. The use of computer systems has become so pervasive in dealership operation that in many cases they are the backbone of the entire administrative and control process. Under this Agreement UCS supplies programs and teaches the Customer how to use them. In some cases, however, generally depending on the relative strength of the Customer's personnel and complexity of operating environment additional business management consulting by UCS personnel may be required to make all systems perform effectively. This is a billable consultation.

UCS's obligation under paragraphs E, F, G, and H above is conditioned upon timely payment by Customer of the Application Support Service Fee listed in Schedule "A".

SECTION 3. Customer Responsibilities.

Customer covenants and agrees to:

A. 1. Appoint and maintain a person of at least department head authority as System Administrator.

2. Send the System Administrator to UCS schools for System Administration.

3. In the event of turnover of the System Administrator, appoint a new System Administrator and send the new System Administrator to the UCS school for System Administration within thirty (30) days.

4. For each application program to be installed, send the Department Manager and one (1) other person from that department to the UCS school for that application program prior to installation.

B Read and be familiar with the operating procedure manuals provided by UCS for general system operation and specific application program operation.

C. Read and be familiar with all system changes and enhancement notifications published by UCS.

D. Operate the overall system and each application program in the manner prescribed in the operating procedure manuals provided by UCS. Failure by the Customer to operate the system in the manner prescribed relieves UCS from all liability and responsibility for subsequent undesirable consequences.

E. Report immediately to UCS in writing and by telephone all situations encountered where the overall system or individual application program does not operate as specified Failure by the Customer to report program problems may result in serious consequences up to and including loss of Customer data. In the event that a program problem occurs and the Customer proceeds without notifying UCS. Customer hereby waives all responsibility on the part of UCS for subsequent consequences

F. Submit in writing all ideas for improvement and enhancement that the Customer believes to be desirable Customer, by the submission of a suggestion, relinquishes all right and title to it and agrees that the idea becomes the property of UCS. UCS is under no obligation to incorporate such suggestions into the programs.

G. Implement all revisions to the operating system and application programs that are released by UCS as soon as they are received by the Customer.

H. Duplicate daily at the close of business the customer's data files contained on disk in the manner prescribed by UCS.

I. Maintain at all times at least two (2) days copies of customer's data files.

J. Maintain tangible customer documents necessary to recreate such customer data as necessary (ie: invoices, purchase orders, and all other source documents).

SECTION 4. Manufacturer's Pricing Data.

As part of the parts inventory control applications programs. UCS agrees to provide manufacturer's pricing data for the manufacturers listed in Schedule "A". UCS agrees to provide this data on a monthly basis or as often as provided by the manufacturer but in no case more often than monthly. The schedule for providing the data to the Customer shall be such that the Customer shall receive it on or before the first calendar day of any month.

The Customer is responsible for sending a blank disk-pack, freight prepaid, by the 15th of each month to UCS for the purpose of transferring the manufacturer's price data on it for return to the Customer. UCS will return the disk-pack with manufacturer's price data on it to Customer, freight collect, or will bill the Customer for transportation charges. The manufacturer's pricing data will be provided to the Customer on the Customer's disk-pack.

Customer understands and agrees to the following:

A. The contracts between UCS and the manufacturers for the provision of price tapes to UCS are written such that UCS has no recourse whatsoever to manufacturer for delays or inaccuracies in the price data provided

B. The contracts between UCS and the manufacturers for provision of price tapes further provide that the contracts themselves, the formats of price tapes, the

type of data provided, the price of such service, and the schedule for providing such data may be changed at the sole decision of the manufacturer, in most cases without notice to UCS.

C. The very nature of the pricing data is to be so large in volume that UCS has no practical way of verifying its accuracy, and therefore. UCS presumes all data received from manufacturers to be accurate and complete. UCS as a matter of policy makes no attempt to check or correct pricing data received from manufacturers.

D. In the case that a customer normally receives pricing data on several manufacturers, one of the manufacturers may be late with distribution of its pricing data. This situation causes UCS, in order to comply with the schedule provided hereunder. to distribute pricing data to the customer that may not include this manufacturer's data. If the customer requests additional distributions of pricing data there will be an additional charge for this service as specified in Schedule "A" Customer therefore acknowledges and agrees that errors. omissions, and delays in manufacturers pricing data are not within the control of UCS Customer hereby waives and releases all claims of any nature whatsoever. against UCS and relieves UCS of all liabilities due to errors. omissions. and delays in manufacturer's pricing data.

SECTION 5. Title.

Title to all programs and software utilized by the Customer in connection with this Agreement shall be and remain vested in UCS or its assignee at all times. Nothing in this Agreement shall give or convey to Customer any

right, title, or interest therein except as a licensee hereinunder upon payment of the Software Licensing Fee set forth in Schedule "A".

UCS hereby grants Customer a personal, exclusive, non-transferable right, and license to use the programs and software specifically designated in Schedule "A" so long as Customer pays UCS the Licensing and Application Support Service Fees set forth in Schedule "A" and is not otherwise in default under the terms of this Agreement.

The above license does not include, and Customer has no right to source code for any of the programs or software.

Customer's rights under this Agreement to use the licensed programs, software, manuals, documentation, and related materials may not be assigned, licensed, or otherwise transferred voluntarily, by operation of law, or otherwise by Customer, except to a purchaser of substantially all of the outstanding capital stock or assets of Customer. Any such purchaser must additionally agree in writing to UCS to be bound by this Agreement, and any such transfer by Customer shall not be binding upon UCS prior to receipt of such written agreement and transfer fee as hereinafter provided. Such purchaser shall at that time pay UCS a $2,000.00 transfer charge in order to cover the additional cost of training and consultation.

Customer may use the licensed programs and software for the internal requirements of an affiliated company at another location by paying an additional initial license and installation fee and an additional application support service fee for each application program so utilized in the amounts specified on Schedule "A". If the affiliated company is at the same location the additional charge will be one-half the fees that are stated above. Customer's

"affiliated companies" shall mean corporations or entities in which Customer owns at least a majority of the outstanding capital stock or equity interest.

Customer and its affiliated companies or entities shall not use the licensed programs to furnish data processing services to any person or entity other than themselves.

UCS and its designee(s) have the right at all times to access into the Customer's in-house computer either in person or by telephone line for the purpose of making software updates or diagnosing the system.

SECTION 6. Documentation

UCS agrees to provide to Customer one user manual for every software package purchased. The manuals will be provided free of charge (except for shipping charges). In addition, UCS will provide to Customer one updated user manual for every software package purchased when major system revisions occur. These manuals also will be provided free of charge (except for shipping charges).

Customer acknowledges and agrees that the manuals provided for every software package purchased contain valuable proprietary information of UCS. Customer agrees to keep confidential the contents of the manuals and not copy, reproduce, publicize, or otherwise disseminate them to third parties.

Customer acknowledges and agrees that extra manuals will be distributed at a charge of $10.00 per extra manual per each shipment (plus applicable shipping charges). Customer also acknowledges and agrees that extra binders will be distributed at a charge of $10.00 per extra binder per each shipment (plus applicable shipping charges)

SECTION 7. Modification.

Customer shall not, without prior written consent of UCS, attempt to modify, revise, or alter the software and programs furnished by UCS under this Agreement. Customer acknowledges that by execution of this Agreement that it has been informed that any modification or attempted modification could have serious undesirable results up to and including destruction of Customer's data. Any modification or attempted modification of the software and programs by the Customer shall entirely void the warranty, if any, provided by UCS in this Agreement.

SECTION 8. Confidentiality.

Customer acknowledges and agrees that the programs and software which are the subject matter of this Agreement are valuable proprietary trade secrets of UCS. Customer agrees to keep confidential the programs and software covered under this Agreement and shall not copy, reproduce, publicize, or otherwise disseminate them to third parties. This Agreement of confidentiality covers not only the programs themselves but all supporting manuals, documentation, and operating instructions.

Customer shall observe complete confidentiality with respect to the Licensed Copy. This means that Customer shall not disclose or otherwise permit any other entity access to the Licensed Copy. As the sole exception to this restriction, Customer may disclose or grant access to the Licensed Copy to employees whose employment requires such access: provided that appropriate steps are taken with them to preserve the confidentiality of the Licensed Software and Materials. Customer shall not copy (except for archive purposes), duplicate, disassemble or decompile the Licensed Copy or the Licensed Software and

Materials. In addition, Customer shall make certain that its employees, agents, customers, vendors and guests are advised of the confidential nature of the Licensed Software and Materials and that adequate measures are taken by Customer to insure that they are prohibited from using (except as allowed by this Agreement), copying, revealing, disassembling or decompiling for any purpose whatsoever, the contents of the Licensed Copy, or any of its parts. Customer shall not directly or indirectly, remove or obscure any proprietary trade sanctioned copyright notice placed upon or embedded in the Licensed Copy.

Because of the unique and proprietary nature of the operating system and application programs, Customer agrees that UCS's remedies at law for a breach of confidentiality by the Customer or his employees are inadequate and that UCS shall be entitled to equitable relief, including without limitation injunctive relief, specific performance or other equitable remedies in addition to all other remedies provided at law or in equity

SECTION 9. Payment Of Invoices.

UCS will invoice the Customer for services rendered under this Agreement between the 15th and 30th day of the month for that month's services. Payment is due upon receipt of the invoice. In the event that payment is not received by the 30th day of the month following the month for which the invoice covers the Customer will be deemed to be in default under the terms of this Agreement and UCS may proceed with any and all available remedies.

Late charges, calculated at the maximum rate currently permitted by law will be charged to Customer on all invoices unpaid after 30 days from the invoice date.

SECTION 10. Extension Of Agreement.

The term of this Agreement is 84 months Following the expiration of the original term, this Agreement shall automatically be extended on a month-to-month basis, and shall continue until either party gives the other 30 days prior written notice to terminate During extensions of the original term, Customer shall pay the then prevailing rates for application program support services.

SECTION 11. Default.

In the event that Customer defaults in any of the following ways:

A. By failing to pay any amount due hereunder in accordance with this Agreement;

B. By otherwise being in breach of this Agreement; and/or

C. By becoming bankrupt or insolvent or if a Petition is filed by or against the Customer as bankrupt, insolvent, or a debtor under any federal or state bankruptcy, insolvency, or reorganization law;

UCS may, at its option, pursue any one or more of the following remedies:

A. Declare all amounts due and to become due immediately due and payable;

B. Suspend all application program support services;

C. Terminate this Agreement;

D. Demand that Customer immediately cease use of all UCS programs and return to UCS all copies of UCS programs and documentation in the Customer's possession;

E. In the event that Customer does not does not [sic] comply with Item D above voluntarily, UCS may enter upon the Customer's premises and disable or retrieve all UCS programs; and/or

F. Pursue any additional or alternative remedies provided at law or in equity.

Customer agrees to reimburse UCS for any and all expenses UCS may incur, including reasonable attorneys' fees in collections of amounts due under this Agreement and in taking any of the foregoing actions.

SECTION 12. Price Revisions.

The monthly application program support service charge for each application program indicated on Schedule A shall remain unchanged until the end of the first one-year period such monthly application program support service charge for such application program was in effect as set forth above. Thereafter, UCS may increase the monthly application program support service charge for such application program from time-to-time, upon at least 30 days prior written notice to Customer, to UCS's then-prevailing price for such application program support service charge set forth in UCS's published price book, in effect from time-to-time or by an amount that does not result in an annual rate of increase greater than the annual percentage rate of price increases for all goods and services as determined by the Bureau of Labor Statistics of the U.S. Department of Labor.

SECTION 13. Taxes.

If, at any time, any transaction contemplated by this Agreement is or becomes taxable, then, in that event, UCS may, at its option, revise the fees provided in Schedule "A"

to include taxes due or may notify Customer that Customer is responsible for determining what taxes are applicable and remitting those taxes to the proper taxing authority.

If the Customer is located outside the State of Texas. Customer is responsible for determining what sales or use taxes, if any, are applicable to this transaction and remitting those taxes to the proper taxing authority.

SECTION 14. Liability And Disclaimer Of Warranties.

UCS represents that the operating system and application programs will be free of defects in materials and workmanship. If UCS is not informed in writing of a defect in the first five (5) days after the installation date, the operating system and application programs shall be deemed to be free of defects at the time of delivery. Thereafter UCS will provide application and support services as described in this Agreement.

Customer agrees that the inability of any UCS program to perform a function that it was not designed or intended to do is not a defect.

Customer further agrees that at the time of signing this Agreement it has examined the operation of the UCS operating system and application programs and found their functions to be complete and satisfactory for Customer's purposes. Customer further agrees that prior to signing this Agreement it has verified independently the fact that these same programs operate successfully in other dealerships.

Customer understands and agrees that in order for any application program to be successfully installed, the Customer's employees must be sufficiently intelligent,

motivated, and have sufficient time to devote to the installation.

UCS specifically does not represent that any specific degree of system availability (up-time) will be achieved. Customer accepts and agrees that the operation of an on-line computer system is an undertaking of the highest degree of complexity and that some system outage (down-time) is inevitable Customer further agrees and accepts that lack of system availability (down-time) will not constitute a breach of this Agreement.

Customer, therefore, agrees because of the above facts that failure to obtain desired results is not the fault of UCS programs and that no liability shall fall on UCS for Customers failing to obtain results that it desires.

EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, MADE BY UCS WITH RESPECT TO THE OPERATING SYSTEM AND APPLICATION PROGRAMS OR OTHER TRANSACTIONS CONTEMPLATED HEREIN. THIS AGREEMENT STATES THE ENTIRE OBLIGATION OF UCS IN CONNECTION WITH THIS TRANSACTION.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, UCS SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO CUSTOMER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF UCS HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. Furthermore, UCS shall not be

liable to Customer for damage or loss of any nature, whatsoever, and Customer's sole and exclusive remedy hereunder shall be the right to have UCS replace or correct defective programs. In any event, if for any reason, UCS is not able to replace or correct defective programs, UCS shall not be liable to Customer for any amount greater than the amount paid by Customer to UCS for the defective program.

SECTION 15. Charges And Invoicing.

Initial license and installation fee as shown in Schedule "A" shall be invoiced on the date each application program has been loaded into the Customer's in-house computer and is available for use, which date shall be conclusively designated by UCS.

Application support service fee as shown in Schedule "A" shall be invoiced at the end of the first full month of operation and thereafter in accordance with the section of this Agreement titled "Payment of Invoices."

Consultation over and above those services specified in this Agreement are billable at the then current rates plus expenses for the UCS personnel involved. Customer shall be informed by UCS when the potential for billable consultation services exists. Customer shall then provide UCS with written authorization to proceed. Charges for consultation shall be invoiced upon completion.

If Customer begins to use the licensed software at an additional location or puts the application software to use for additional entities requiring additional customer numbers to be set up, UCS shall automatically bill the customer for such additional uses at the UCS then current

published rates beginning on the first day of the month following the first input of data.

SECTION 16. Discount.

If the Customer purchases all printed forms that are used in conjunction with all UCS application programs from Universal Computer Forms, Inc. a discount as stipulated on Schedule A will be given on all monthly application program support fees.

SECTION 17. ANY CLAIM, GRIEVANCE, OR CONTROVERSY BETWEEN CUSTOMER AND UCS (INCLUDING ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF EITHER OR BOTH) ARISING OUT OF THIS AGREEMENT SHALL BE SETTLED BY ARBITRATION.

Customer and UCS may agree upon one arbiter, otherwise, there shall be three, one named in writing by each party, and the third chosen by the two arbiters so selected. If the arbiters fail to select a third within ten (10) days, or should either party hereto fail to select an arbiter, he shall be chosen by a District Judge serving Harris County, Texas. Should the party demanding the arbitration fail to name an arbiter within ten (10) days of the demand, his right to arbitrate shall lapse. The decision of any two of the arbiters shall be binding on both parties to this Agreement. The decision of the arbiters upon any question submitted to arbitration under this Contract shall be a condition precedent to any right of legal action. The decision of the arbiter or arbiters may be filed in Court to carry it into effect.

SECTION 18. Miscellaneous Provisions.

A. This Agreement will be effective and binding only when executed in Houston, Texas by an officer of UCS denoting its acceptance.

B. This Agreement contains the entire understanding between the parties. This Agreement supersedes all prior agreements and understandings, written or oral, between the parties and may not be changed or terminated orally. No change, termination, or attempt to waive any of the provisions hereof shall be binding unless in writing and signed by an officer of both parties. No prior representations or statements, written or oral, shall be deemed to be a part of this Agreement unless specifically set forth herein. Forbearance or indulgence by either party in any regard shall not constitute a waiver of the terms or conditions to be performed of this Agreement, and until the performance of the terms or conditions is complete, the other party may invoke any remedy available under this Agreement or by law, despite the forbearance or indulgence.

C. This Agreement shall be governed by the laws of the State of Texas. If any of the provisions or portions thereof are determined to be invalid or unenforceable, such invalid provisions or invalid portions shall be severed from this Agreement and all other provisions hereof shall remain in full force and effect.

D. No action, regardless of form, arising out of transactions under this Agreement, may be brought by either party more than one year after the cause of action has accrued.

E. Customer may not assign its rights and/or obligations hereunder without the written consent of UCS and any attempt to do so shall be void.

F. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns, as permitted herein, moreover, any payment or obligation due, or hereinafter due UCS may be assigned or transferred by it upon notice to Customer, and such transferee or assignee shall have the rights, powers, privileges and remedies of UCS hereunder, without right of off-set or counter-claim by Customer.

G. Any notice required or permitted to be sent under this Agreement shall be delivered by hand or mailed by registered or certified mail, return receipt requested, to the addresses of the parties set forth in this Agreement. Notice so sent will be deemed effective when deposited in the mail with proper postage prepaid.

EXECUTED as of the 27 day of Sept, 1984

ACCEPTED BY:	CUSTOMER:
UNIVERSAL COMPUTER SOFTWARE, INC.	SWT Investments, Inc.
3724 Dacoma Houston, Texas 77092	6060 Southwest Freeway Houston, Texas 77057
By /s/ R.T. Brockman	By /s/ Sterling B. McCall, Jr.
Name R. T. Brockman	Name Sterling B. McCall, Jr.
Title President	Title President
Date 9-28-84	Date 9/27/84

Cause No. 99-11466

UNIVERSAL COMPUTER SYSTEMS, INC, UNIVERSAL COMPUTER CONSULTING, LTD., UNIVERSAL COMPUTER SERVICES, INC., and DEALER COMPUTER SERVICES, INC.	§	IN THE DISTRICT COURT
Plaintiffs	§	OF HARRIS COUNTY, TEXAS
v.	§	133RD JUDICIAL DISTRICT
DEALER SOLUTIONS, L.L.C., and DEALER SOLUTIONS HOLDINGS. INC.	§	
Defendants	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES

TO: Defendant, **Dealer Solutions Holdings, Inc.,** by and through its attorney of record, Robin L. Harrison, 4000 Two Houston Center, 909 Fannin Street, Houston, Texas 77010.

Plaintiffs submit the following Responses to Defendants' First Set of Interrogatories pursuant to Rules 167 and 68 of the Texas Rules of Civil Procedure,

Respectfully submitted,

/s/ John C. Allen

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded by hand delivery, telephonic document transfer, or certified mail, return receipt requested, to the following counsel of record on this the 11 day of May, 1999:

Robin L. Harrison
Campbell Harrison & Wright, L.L.P.
4000 Two Houston Center
909 Fannin Street
Houston, Texas 77010

/s/ John C. Allen
John C. Allen
Aaron D. Weinberg

INTERROGATORIES

INTERROGATORY NO. 1: Identify specifically the UCS "confidential and proprietary software" that you contend was accessed by DSI personnel for the purpose of determining its functionality in order to design DSI software [as alleged in your Petition ¶¶ 10 and 11].

ANSWER:

Accounting
On-line Accounts Payable (Checkwriter)
Parts Inventory Control
Vehicle Inventory Control
Service Invoicing
Customer & Service History
Payroll
Finance and Insurance
Front-End Management
Finance Company Receivable

Time Clock
General Manager
Telephone Cost Control
Sales Prospect Control
PC Attach
Lexus Price Tape
Toyota Price Tape

INTERROGATORY NO. 2: Identify specifically the UCS hardware and software operations manuals or other documentation or parts thereof, that you contend were utilized by DSI personnel for the purpose of assisting in the design of the functional characteristics of the DSI software [as alleged in your Petition, ¶¶ 10 and 11, and your Response to Defendants' Request for Disclosure, Part (c)].

ANSWER:

System Administrator's Manual, as well as manuals associated with system applications in response to #1 above, with updates.

INTERROGATORY NO. 3: Identify specifically the data records and data fields contained in any UCS software that you contend were accessed by DSI personnel to design DSI software [as alleged in your Petition ¶¶ 10 and 11, and your Response to Defendants' Request for Disclosure, part (c)].

ANSWER:

Accounting
On-line Accounts Payable (Checkwriter)
Parts Inventory Control
Vehicle Inventory Control
Service Invoicing
Customer & Service History

Payroll
Finance and Insurance
Front-End Management
Finance Company Receivable
Time Clock
General Manager
Telephone Cost Control
Sales Prospect Control
PC Attach Feature
Lexus Price Tape
Toyota Price Tape

INTERROGATORY NO. 4: Identify specifically the UCS software or computer systems that you contend were accessed by DSI personnel to run testing benchmarks or for the purpose of making comparative analyses to facilitate the testing and perfecting of DSI software [as alleged in your Petition ¶¶10 and 11, and your Response to Defendants' Request for Disclosure, part (c)].

ANSWER:

Accounting
On-line Accounts Payable (Checkwriter)
Parts Inventory Control
Vehicle Inventory Control
Service Invoicing
Customer & Service History
Payroll
Finance and Insurance
Front-End Management
Finance Company Receivable
Time Clock
General Manager
Telephone Cost Control
Sales Prospect Control
PC Attach
Lexus Price Tape
Toyota Price Tape

CRT Terminals
Report Printers
Test Printers
Mini Printers
Line Printers
9000MP CPU w/24576K, 4 TP lines, (4) 500MB Disk Drives, (4) Internal Communication Ports and (1) 2000 MB Tape Drive
PC Attach Feature

INTERROGATORY NO. 5: Identify specifically and "rule and reflexes" contained in any UCS software or computer system that you contend were copied by DSI (as alleged in your Response to Defendants' Request for Disclosure, part (c)].

ANSWER:

Accounting
On-line Accounts Payable (Checkwriter)
Parts Inventory Control
Vehicle Inventory Control
Service Invoicing
Customer & Service History
Payroll
Finance and Insurance
Front-End Management
Finance Company Receivable
Time Clock
General Manager
Telephone Cost Control
Sales Prospect Control
PC Attach
Lexus Price Tape
Toyota Price Tape

INTERROGATORY NO. 6: Identify any other alleged proprietary information, confidential information or trade

secret of UCS that you contend was accessed by DSI personnel for any purpose.

ANSWER:

Accounting
On-Line Accounts Payable (Checkwriter)
Parts Inventory Control
Vehicle Inventory Control
Service Invoicing
Service Dispatching
Customer & Service History
Payroll
Distribution and G/L Interface
Time Clock
Finance and Insurance
Front-End Management
Sales Prospect Control
Integrated Credit Bureau Inquiry
PC Attach Feature
Ford DCCS
Ford DOES II
Human Resource Management
General Manager
Telephone Cost Control
Fixed Asset System
Automotive Product Training
E-Mail
Accounting to Payroll Download
Front-End Extended Reports
Document Retrieval
On-Line Transaction Log
Service Daily Work Program
Parts Label Printer
Electronic Data Interchange-Warranty Credits
FordNet
Window Sticker
Electronic Funds Transfer

Electronic E Forms
Integrated Concepts Sales Entry
Customer Satisfaction Index
Lease Residual Tables
Credit Net II
Purchase Requisition Control – Basic
Purchase Requisition Control – Parts
Purchase Requisition Control – Sublet
Purchase Requisition Control – Vehicle
Electronic Cash Register
Electronic Cash Tracking
SPC Laser Letters
Warranty Management System
Jaguar DCS
Jaguar Price Tape
Hyundai Price Tape
FMC Price Tape

Double Capacity Tape Drive
PC Attach Feature
Mini Printers Local Bridge
Coax to Fiber Optic Converter
Twisted Pair to Fiber Optic Converter
Factory Communication Unit
9370-90 CPU w/ 16384K, 12 TP Lines
9370 Uninterruptible Power Supply
400 MB Disk Drives
CRT's
Text Printers Power Workstations
Report Printers
FordNet Modem
FordNet Communications Processor

INTERROGATORY NO. 7: For each item, document or other information identified by you in your answer to interrogatory nos. 1-6, above, state whether you contend that such item, document or other information is a trade

secret and the legal theories and factual bases for such contention.

ANSWER:

The items, documents and other information are trade secrets. The foregoing is information used in the operation of Plaintiffs' business that is sufficiently valuable and secret to afford the business a competitive advantage over others. The items, documents and other information is not known outside the business, is guarded by the business from disclosure, gives the business a competitive advantage over others, has been developed by the business through effort and expense and is difficult to acquire or duplicate by others.

INTERROGATORY NO. 8: State specifically the manner in which any item, document or item of information identified by you in your answers to interrogatory nos. 1-6 above, was used by DSI in the design or development of its dealer management or dealer communications software.

ANSWER:

The items, documents and/or items of information were used by DSI in the design or development of its dealer management and/or dealer communication software. This information, is used in the operation of Plaintiffs' business that is sufficiently valuable and secret to afford the business a competitive advantage over others. The information is not known outside the business, is guarded by the business from disclosure, gives the business a competitive advantage over others, has been developed by the business through effort and expense and is difficult to

acquire or duplicate by others. The complexity of the method by which the information is provided through the software application is virtually impossible to attain over the relative time frame.

INTERROGATORY NO. 9: Identify each Plaintiff that you contend is the owner of each item, document or item of information identified by you in your answer to interrogatory nos. 1-6, above.

ANSWER:

Universal Computer Consulting, Ltd.

INTERROGATORY NO. 10: Identify each person that you expect to call to testify at trial.

ANSWER:

To be determined.

INTERROGATORY NO. 11: Identify each element of damages claimed by you in this action and, for each such element, state the amount of damages claimed and describe in detail the manner in which the amount is calculated.

ANSWER:

It is impossible at this point to calculate any monetary damages, Defendants' dissemination of trade secret information – the very heart of Plaintiffs' business – constitutes irreparable injury for which there is an inadequate remedy at law. Plaintiffs' seek preliminary injunctive relief and permanent injunctive relief. Alternatively, and without waiving the foregoing, based on discovery, Plaintiffs may also be entitled to monetary damages.